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TRANSCRIPT OF RECORD.

UPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 590 2662 56.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY, PLAINTIFFS IN ERROR,

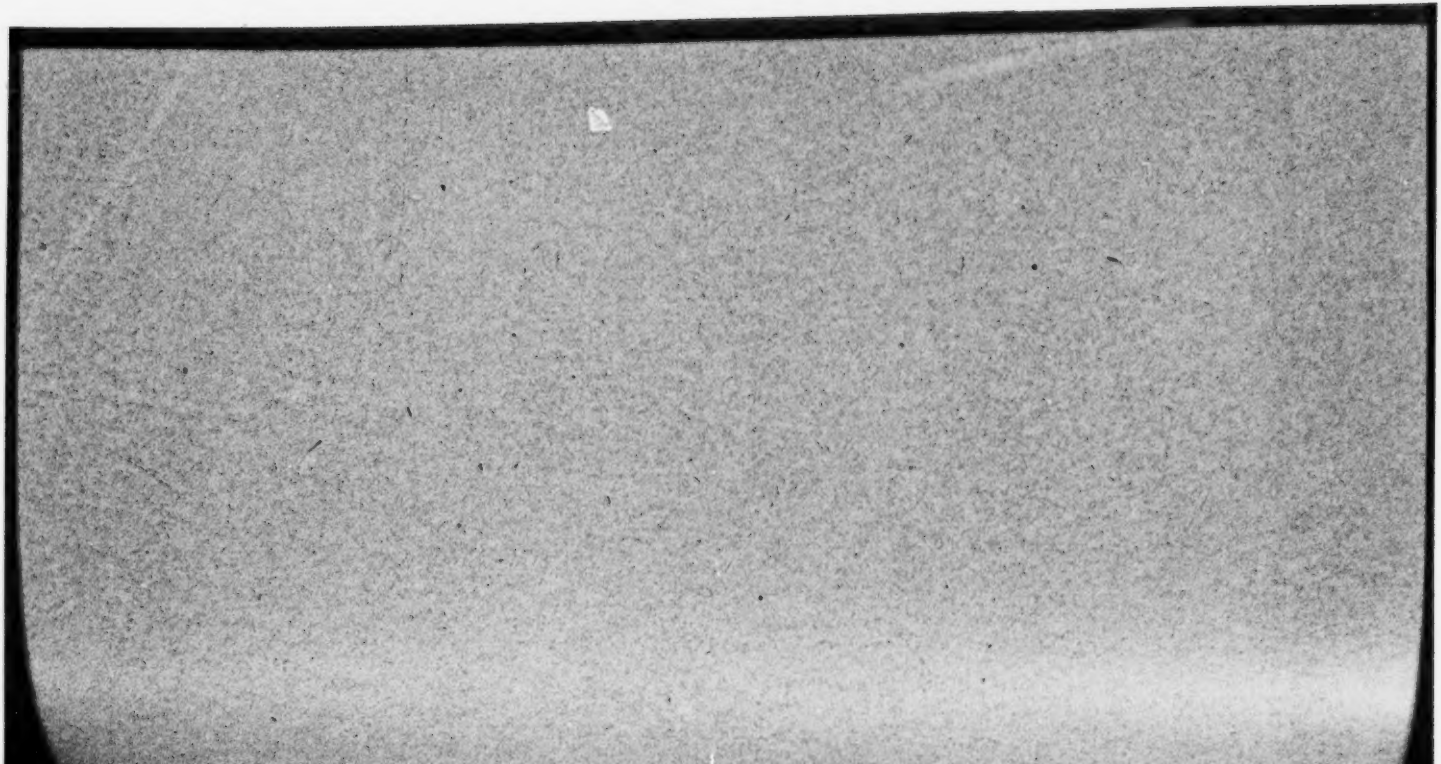
vs.

CHARLES B. SHEDD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED MARCH 7, 1901.

(18075)



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

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GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY,
PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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Petition for Writ of Error.

IN THE SUPREME COURT OF ILLINOIS,

As of December Term, A. D. 1898.

IN THE MATTER OF GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY, *Appellants,* v. CHARLES B. SHEDD, *Appellee.*	*Appeal from Circuit Court of Cook County; Honorable Murray F. Tuley, Judge, presiding.*

To the Honorable Carroll C. Boggs, Chief Justice of said Supreme Court:

Your petitioners, Gertrude H. Hardin and the Cook County Canal and Dock County, the appellants aforesaid, respectfully suggest that in the matter aforesaid, a federal question reviewable in and by the Supreme Court of the United States on error assigned, was and is presented.

That the said appellants, both in the Circuit Court and in this Court, claimed right, title and privilege through or under certain Land Office certificates and Patents, to wit: those to John Holbrook and William B. Egan, respectively, set up in the pleadings and offered in evidence, and under a certain judgment in the Circuit Court of the United States for the Northern District of Illinois in favor of said Gertrude H. Hardin, which title, right and privilege respectively were by this Court, in and by the reversal in part of the decree first rendered in the Circuit Court of Cook County, and otherwise, denied to the said appellants in the manner and form claimed by them respectively. That the said appellants claimed under the laws of the United States to be through said certificate and Patents, respectively, the owners to the center of the lake of the submerged lands constituting a part of the lake bed at the time of the survey of 1834–5, and at the time of the making of said certificates and Patents respectively, and this Court, though finding the lake to be non-navigable, denied such claim of right, title and privilege as set up or asserted, and held that the said appellants, although riparian proprietors, took title to the water's edge only, with the right to accretions as the waters had receded or should recede.

That the judgment of this Court rendered on or about the 21st day of December, A. D. 1898, was final, and in the Court of the State of last resort. That the record thereof remains in this Court. That it is the right of your petitioners to have the same re-examined by the Supreme Court of the United States upon writ of error in accordance with the Act of Congress in such case provided. That the record presenting the federal question includes the

judgment rendered in this Court at the January Term thereof, 1896, as well as the judgment rendered in this Court on or about the 21st day of December, A. D. 1898, and the decrees of the Circuit Court considered or reviewed in said Opinions respectively; the former judgment having remanded the cause to the Circuit Court for further proceedings, and the latter judgment having followed an appeal from such further proceedings; wherefore it will be necessary to review both judgments, and the record, proceedings and decrees upon which this Court passed, and to have the Opinions filed herein on both occasions attached to the record:

Wherefore your petitioners pray for a writ of error in the premises under the Act of Congress in such case provided, and that a Citation be signed and made returnable as provided by law and the rules of the Supreme Court of the United States; and your petitioners respectfully offer to give good and sufficient security that they will prosecute the writ of error to effect, and if they fail to make their plea good shall answer all costs; and your petitioners pray for such further proceedings and process as to law and equity pertain in the premises.

And, as in duty bound, your petitioners will ever pray, &c.

GERTRUDE H. HARDIN and
THE COOK COUNTY CANAL & DOCK CO.,
By DENT & WHITMAN,
Their Attorneys.

(Endorsed) Filed Dec. 14th, 1900. C. Mamer, Clerk.

Order that a Federal Question is Presented.

IN THE MATTER OF GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY, *Appellants,* v. CHARLES V. SHEDD, *Appellee.*	In the Supreme Court of Illinois. *Appeal from Circuit Court of Cook County.*

It is ordered by the Chief Justice of the Supreme Court that it be certified in this case that appellants Gertrude H. Hardin and the Cook County Canal and Dock Company, by virtue of or under the Land Office certificates and Patents from the United States to John Holbrook and William B. Egan, respectively, claimed title in fee to the lake bed or submerged lands in front of the tracts respectively described in said certificates and Patents, respectively, as being a part of the grant from the United States; that the said appellants respectively claimed the land to the center of the lake under said certificates and Patents, respectively, and that the Court, as per its Opinion and Judgment, on or about January 17, 1896, (the Opinion being reported in 161 Ill. Reports at page 462,) finding that the lake, though non-navigable, was meandered in the government survey,

denied the right of the said appellants to the lake bed or submerged lands, except as accretions were or should be formed, limiting them to the water's edge, but giving them riparian rights as the waters should recede, as the Opinion of the Court shows.

December 14th, 1900.

CARROLL C. BOGGS,
Chief Justice Supreme Court of Illinois.

O. K.
H. S. MECARTNEY,
for appellee.
THOMAS DENT,
for appellants.

(Endorsed) Filed Dec. 14th, 1900. C. Mamer, Clerk.

Writ of Error.

IN THE SUPREME COURT OF THE UNITED STATES.

As yet of the October Term, A. D. 1900.

IN THE MATTER OF GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY (APPELLANTS FROM CIRCUIT COURT OF COOK COUNTY, ILLINOIS),
v.
CHARLES B. SHEDD,
Appellee.

UNITED STATES OF AMERICA, } ss.

The President of the United States to the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the State of Illinois greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Illinois before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had between Gertrude H. Hardin and the Cook County Canal and Dock Company, appellants from the Circuit Court of Cook County, and Charles B. Shedd, appellee, wherein was drawn in question a certain right, title and privilege through or under certain Land Office Certificates and Patents issued to John Holbrook and William B. Eagan, respectively, made and executed in pursuance of the Act of Congress in such case made and provided, and the decision was against the right, title and privilege specially set up and claimed under the authority of the United States and the Act of Congress in such case provided concerning the survey and sale of public lands:

A manifest error hath happened to the great damage of the said

Gertrude H. Hardin and the Cook County Canal and Dock Company, as by the Complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from this date, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fourteenth day of December, in the year of our Lord one thousand nine hundred.

(Seal of the Circuit Court of the United States, Southern District of Illinois.)

JAMES T. JONES,
Clerk of Circuit Court of United States.

Allowed by
CARROLL C. BOGGS,
Chief Justice Supreme Court of Illinois.

(Endorsed) Filed Dec. 14th, 1900. C. Mamer, Clerk.

Bond.

Know all men by these presents, That we, Gertrude H. Hardin and the Cook County Canal and Dock Company and Isaac N. Hardin, are held and firmly bound unto Charles B. Shedd in the full and just sum of One thousand dollars ($1,000.00), to be paid to the said Charles B. Shedd, his certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by These Presents.

Sealed with our seals (the corporate seal of the Cook County Canal and Dock Company being affixed as well as the private seals of the other obligors), and dated this 14th day of December, in the year of our Lord one thousand nine hundred.

Whereas, lately, at a certain term of the Supreme Court of the State of Illinois, to wit: on or about the 21st day of December, A. D. 1898, in a suit depending in said Court between Gertrude H. Hardin and the Cook County Canal and Dock Company, appellants from the Circuit Court of Cook County, and Charles B. Shedd, appellee, judgment was rendered against the said appellants, and the said appellants, having obtained a Writ of Error, and filed a copy thereof in the Clerk's office of the said Court, to reverse the judgment in the aforesaid suit, and a Citation directed to the said Charles B. Shedd, citing and admonishing him to be and appear at

the Supreme Court of the United States to be holden at Washington within thirty days from this date, in pursuance of the Statutes of the United States and rules of said Court, respectively, in such case made and provided:

Now the condition of the above obligation is such, that if the said Gertrude H. Hardin and the Cook County Canal and Dock Company shall prosecute said Writ of Error to effect, and answer all costs, if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

(Seal of Cook County Canal and Dock Co.)

GERTRUDE H. HARDIN. (Seal)

THE COOK COUNTY CANAL & DOCK CO.

By I. N. HARDIN,

President.

ISAAC N. HARDIN (Seal)

Sealed and delivered in the Presence of

JOHN H. HARDIN,

As to signature of Gertrude H. Hardin.

THOMAS DENT,

As to Cook County Canal & Dock Co. and Isaac N. Hardin.

Approved by me.

CARROLL C. BOGGS,

Chief Justice of the Supreme Court of Illinois.

(Endorsed) Filed Dec. 14th, 1900. C. Mamer, Clerk.

Citation.

IN THE SUPREME COURT OF THE UNITED STATES,

As yet of the October Term, A. D. 1900.

IN THE MATTER OF GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY, APPELLANTS (FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS,)

v.

CHARLES B. SHEDD,

Appellee.

The United States of America, Greeting:

You, the said Charles B. Shedd, are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty days from this date, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Illinois in the matter aforesaid, wherein said Gertrude H. Hardin and the Cook County Canal and Dock Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs

in error, and the denial of the right, title and privilege claimed by them respectively in said cause, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable Carroll C. Boggs, Chief Justice of the Supreme Court of the State of Illinois, this 14th day of December, in the year of our Lord one thousand nine hundred.

CARROLL C. BOGGS,
Chief Justice of the Supreme Court of Illinois.

Service by copy acknowledged this 19th day of December, A. D. 1900.

H. S. MECARTNEY,
Attorney for Charles B. Shedd.

STATE OF ILLINOIS, } ss.
County of Cook. }

On this 21 day of December, in the year of our Lord one thousand nine hundred, personally appeared George H. Thompson before me, the subscriber, a Notary Public in and for said County, and makes oath that he delivered a true copy of the within Citation to Harry S. Mecartney, and also a true copy of the same to William Prescott, they being attorneys of record of the said Charles B. Shedd; also a true copy of the same to the said Charles B. Shedd.

Given under my hand and Seal Notarial.

ALVERSON E. MORLEY,
(Seal) *Notary Public in and for said County.*

(Endorsed) Filed Dec. 22d, 1900. C. Mamer, Clerk.

Affidavit for Enlargement of Time for Preparing Record.

IN THE SUPREME COURT OF THE UNITED STATES,

To the October Term thereof A. D. 1900.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY, *Plaintiffs in Error,* v. CHARLES B. SHEDD, *Defendant in Error.* } *Error to the Supreme Court of Illinois.*

STATE OF ILLINOIS, } ss.
County of Sangamon. }

Isaac N. Hardin, being duly sworn, says on oath that he is agent for and representative of the plaintiffs in error aforesaid, and is familiar with the record herein, a transcript of which is to be transmitted to the Clerk of the Supreme Court of the United States.

Affiant further states that the record is one of great magnitude, and selections therefrom of matters pertinent to the making up of

the record for the Supreme Court of the United States will be necessary, yet the transcript must be of considerable bulk, and that thirty days will be an insufficient time for the making up of such transcript; though he hopes to be able to have the same made up within ninety days from this date. He further states his belief that the term of ninety days will be needed for the making up of such transcript and the return of the same to the Clerk of the Supreme Court of the United States.

ISAAC N. HARDIN.

Subscribed and sworn to before me this 14th day of December, A. D. 1900.

C. MAMER,
Clerk.

(Seal Supreme Court State of Illinois.)
(Endorsed) Filed Dec. 14th 1900. C. Mamer, Clerk.

Order Enlarging Time for Preparing Record.

IN THE SUPREME COURT OF THE UNITED STATES.

To the October Term thereof, A. D. 1900.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY, *Plaintiffs in Error,* v. CHARLES B. SHEDD, *Defendant in Error.* } *Error to the Supreme Court of Illinois.*

For good cause shown, the undersigned, Chief Justice of the Supreme Court of said State, having signed the Citation herein, hereby enlarges the time for the docketing of this cause in the Supreme Court of the United States, and the filing of the record thereof with the Clerk of said Court, and allows an extension of such time for ninety days from and after this 14th day of December, A. D. 1900.

CARROLL C. BOGGS,
Chief Justice of the Supreme Court of Illinois.

(Endorsed.) Filed Dec. 14th, 1900. C. Mamer, Clerk.

For Clerk's Certificate making return to the Writ of Error see the part of this transcript next preceding Appendix A.

Assignment of Errors.

SUPREME COURT OF THE UNITED STATES,

Of the October Term thereof, in the year of our Lord one thousand and nine hundred.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY,
Plaintiffs in Error,
v.
CHARLES B. SHEDD,
Defendant in Error.

Error to the Supreme Court of the State of Illinois.

And now come the said plaintiffs in error, severally and respectively, by Thomas Dent, their attorney and of counsel, and severally and respectively say that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the said Supreme Court of Illinois erred in denying and refusing to give effect to the right, title and privilege respectively set up and claimed by the said plaintiffs in error severally and respectively through or under the entries at the United States Land Office by John Holbrook and William B. Egan, respectively, and through or under the Patents from the United States to the said John Holbrook and William B. Egan, respectively.

Second. That the Court unduly limited, restricted and abridged the right, title and privilege set up or claimed by the said plaintiffs in error, severally and respectively, under the laws of the United States, resulting from the said Patents when the entries in the Land Office represented in and by said Patents were of land on and covering in part a non-navigable lake.

Third. That the Judgment ought to have been for the plaintiffs in error respectively; that they were, as claimed by them, owners of the submerged lands to the center of the lake.

Fourth. That the Court erred in holding that said plaintiffs in error, respectively, were owners only to the water's edge of their said lands.

Fifth. That the Court erred in holding that the meandering by the Surveyor or Deputy Surveyor of the lake gave the State of Illinois rights and control in the premises, to the impairment of the rights of appellants as owners of the submerged portion of their lands, thus depriving plaintiffs in error of ownership except through accretions to the bed or submerged part of the lands.

Sixth. That the Court erred in fixing the time for determining the limits or boundaries of the land, not regarding the situation or condition thereof, as represented by the official plat of the survey of the same returned to the General Land Office, but adjudging that the limits or boundaries in the matter of the several tracts would be according as accretions (so called) had formed at an arbitrary date, during the progress of the cause, or at the hearing of the same.

Seventh. That the Court erred in awarding an undue portion of the former submerged lands to said Charles B. Shedd and an inadequate portion to the plaintiffs in error respectively, thus proceeding upon a wrong or inequitable principle, contrary to the claim made by the said plaintiffs in error respectively, under the laws of the United States.

Eighth. That the Court erred in not following the decision of the Supreme Court of the United States as to the construction and effect in respect to the lake bed of the Patent titles from the United States set up and claimed by the plaintiffs in error.

Wherefore, and because of the injustice done the said plaintiffs in error, they respectfully pray that the judgment of the Supreme Court of Illinois and the decree of the Circuit Court of Cook County, Illinois, so far as it denies the right claimed by the plaintiffs in error respectively, may be reversed, and that they may recover what they have lost thereby, &c.

THOMAS DENT,
Attorney and of Counsel for Plaintiffs in Error.

Placita.

At a Supreme Court, Begun and held at Springfield, on Tuesday, the Fifth Day of October, in the year of our Lord One Thousand Eight Hundred and Ninety-seven, within and for the State of Illinois.

Present—Jesse J. Phillips, Chief Justice.

Alfred M. Craig, Justice. Benjamin D. Magruder, Justice.
Jacob W. Wilkin, Justice Joseph N. Carter, Justice.
James H. Cartwright, Justice. Carroll C. Boggs, Justice.
Edward C. Akin, Attorney General.
Edward A. Baxter, Sheriff.
Attest: Christopher Mamer, Clerk.

Be it Remembered that the record and proceedings following appear in said Court:

1. From the record returned to said Court from the Circuit Court of Cook County, Illinois, prior to the January Term, A. D. 1896, of said Supreme Court, including the judgment orders at said term; which said Transcript was refiled October 6, A. D. 1897, per leave of said Supreme Court.

2. From the record returned to said Supreme Court from the Circuit Court of Cook County, Illinois, prior to the December Term, A. D. 1898, of said Supreme Court, to-wit: October 6, 1897, including the judgment order at said mentioned term.

Parties to Original Petitions under Burnt Records Act.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

Petition in No. 442 B. R.

Charles B. Shedd, Petitioner, vs. Elizabeth P. Thomas, Conrad N.

Jordan, Frank I. Bennett, James W. Converse, Andrew Crawford, Charles H. Wisner, Gertrude H. Hardin, The South Chicago and Southern Railroad Company, William Bush, James W. Smith, John E. Curtis, Samuel Davis, Thomas Wilkerson, Solomon Field and the unknown heirs and devisees of Charles D. Gilmore, and All whom it may concern, Defendants.

In Petition No. 443 B. R.

Charles B. Shedd, Petitioner, vs. J. Ensign Fuller, Conrad N. Jordan, John I. Bennett, Frank I. Bennett, Henry M. Alexander, Ashbell Green, Gertrude H. Hardin, Treat Campbell, The South Chicago and Southern Railroad Company, Cook County Canal and Dock Company, William K. Reed, Jabez G. Smale, and All whom it may concern, Defendants.

Appeals to the Supreme Court of Illinois were entitled as follows:

January Term, 1893; decided January 17th, 1896.

J. Ensign Fuller, Conrad N. Jordan, John I. Bennett and Frank I. Bennett, Appellants, v. Charles B. Shedd and Gertrude H. Hardin, Appellees.

Elizabeth P. Thomas, Appellant, v. Charles B. Shedd, Appellee.

The South Chicago and Southern Railroad Company, Appellant, v. Charles B. Shedd and Gertrude H. Hardin, Appellees.

Franklin A. Cleveland, Appellant, v. Gertrude H. Hardin, Appellee.

Charles E. Rand, Appellant, v. Gertrude H. Hardin, Appellee.

October Term, 1897; decided December 21st, 1898.

Gertrude H. Hardin and The Cook County Canal and Dock Company, Appellants, v. Charles B. Shedd, Appellee.

Franklin A. Cleveland and Chester B. Rushmore, Appellants, v. Charles B. Shedd, Appellee.

1. From the Transcript from said Circuit Court filed in said Supreme Court February 15, 1893:

Petition of Charles B. Shedd in No. 442 B. R.

STATE OF ILLINOIS, *County of Cook.* } ss. Circuit Court of Cook County, of the June Term, A. D. 1888.

To the Honorable Judges of the Circuit Court Cook County in Chancery sitting:

Your orator, Charles B. Shedd, of said County, respectfully represents and shows unto your Honors that at the time of the destruction of the Records hereinafter mentioned, a grantor under whom he claims title was the owner, and that he is now the owner in fee simple of the following described land, situate, lying and being in the County of Cook and State of Illinois, to-wit: Fractional Sec-

tion Twenty-nine (29), Township Thirty-seven (37) North, Range Fifteen (15) East of the Third Principal Meridian.

That the title of your orator in and to said land is derived in the following manner: On May 8th, 1855, the same was sold to Stephen A. Douglas by the Register of the United States Land Office at Chicago and a certificate therefor given him on October 1st, 1855; Letters Patent of the United States were issued granting said land to said Stephen A. Douglas, which said Letters Patent were duly filed for record in the Recorder's Office of said Cook County on October 22, 1864, and recorded in Book 281, page 467.

On the third day of June, 1861, said Stephen A. Douglas died at said county, the owner of said Fractional Section 29. On the 12th day of June, 1861, the last will and testament of said Stephen A. Douglas was filed in the County Court of Cook County, and was proven and admitted to record July 16th, 1861. That in and by said last will and testament he left one-half of his estate to his widow Adele, one-fourth to his son Robert M., and one-fourth to his son Stephen, and therein appointed his wife Executrix, and Daniel P. Rhodes Executor of his estate. That said Daniel P. Rhodes was appointed and qualified as sole Executor of said estate.

On April 4th, 1864, said Daniel P. Rhodes as such Executor filed his Petition in the Circuit Court of Cook County setting forth that a large amount of debts had been proven against said estate, and that there were no personal assets, and asked leave to sell said real estate, with other real estate, belonging to said Douglas. That the heirs and devisees of said Douglas had due notice of said Petition by publication in accordance with the Statute, and on May 27th, 1864, by decree of said Court a Guardian *ad litem* was appointed for said heirs, who were minors, and he filed an answer for them to said Petition. On July 18th, 1864, a decree of said Court found the allegations in said Petition to be true and ordered said Executor to sell said real estate, and all the interest of the heirs of said Douglas therein. On September 24th, 1864, said Executor filed a Report of Sale of said Fractional Section 29, that he had sold the same to John Forsythe on September 22nd, 1864, and on said September 24th, 1864, a decree was entered by said court in all respects ratifying and confirming said sale. On September 26th, 1864, said Executor made, executed, acknowledged and delivered to said John Forsythe a deed of said real estate, which said deed was duly filed for record in said Recorder's office on October 19th, 1864, and recorded in Book 285 of Records, page 401. On May 29th, 1876, said John Forsythe and his wife made, executed, acknowledged and delivered a deed of said real estate to Catherine M. Gordon, which said deed was on the 30th day of May, 1876, filed for record in said Recorder's Office, and recorded in Book 663, page 8.

On October 23rd, 1886, said Catherine M. Gordon, a widow, made, executed, acknowledged and delivered to Lizzie Prescott a

deed of said real estate, which said deed was on the 21st day of April, 1888, filed for record in said Recorder's Office and recorded in Book 2338, page 221. On December 18th, 1886, said Lizzie Prescott and her husband made, executed, acknowledged and delivered a deed to the undivided one-half of said real estate to your orator, Charles B. Shedd, which said deed was filed for record on April 21st, 1888, in said Recorder's Office, and recorded in Book 2309, page 139. On February 27th, 1888, said Lizzie Prescott and her husband made, executed, acknowledged and delivered a deed to the other undivided half of said real estate to your orator, Charles B. Shedd, which said deed was filed for record in said Recorder's Office on April 21st, 1888, and recorded in Book 2346, page 118. And your orator represents that the foregoing show a direct and continuous chain of title from the United States to your orator, and he claims to be the owner thereof in fee simple.

And your orator further states that the public records of said County of Cook on or about the 9th day of October, 1871, were totally destroyed by fire and that especially said records, so far as the same relate to the title to said land, and especially the record of the deed from the Executor of the Estate of Stephen A. Douglas to John Forsythe, and the proceedings in the matter of the estate of said Douglas and of said Executor to sell said real estate, were totally destroyed by fire during the month of October, 1871, and furthermore that the original title deed or conveyance from the Executor of the estate of Stephen A. Douglas to John Forsythe, above set forth, has been lost or destroyed and is not in the power of your orator to produce on the trial of this cause.

And your orator further states that the following persons are in possession of portions of said lands; your orator is in possession of the Southwest quarter of the Southwest quarter so far as the same is not covered with water, except about seven acres thereof in the extreme southwest corner thereof, the possession of which is claimed by Frank I. Bennett, but no one is in the actual occupancy thereof. That Frank I. Bennett, James W. Converse and Conrad N. Jordan claim to have possession of the North half of the Southwest quarter, and the South half of the Northwest quarter, so far as the same is not covered with water, by William Bush, their tenant. That Andrew Crawford claims to have possession of the North half of the Northwest quarter so far as the same is not covered with water, but no one is in the actual occupancy thereof. That the South Chicago and Southern Railroad Company is in possession of a strip of land used for right of way running through a portion of said section, and that no other person is in possession of said land, said fractional section 29, or any portion thereof, to the knowledge of your orator.

And your orator further states that the following named persons are all the persons to whom said lands, or any part thereof, have been conveyed, and the deed of such conveyance recorded in the office of the Recorder of Deeds of the said Cook County since the

time of the destruction of said records, as aforesaid, and prior to the filing of this Petition, and the residence of such persons is as hereinafter stated as follows, and no other such persons are known to your orator. James W. Smith, John E. Curtis, Samuel Davis, Thomas C. Wilkerson, Solomon Field, residences unknown, Charles D. Gilmore, residence unknown, Elizabeth P. Thomas, residence Washington, D. C., Conrad N. Jordan, residence New York City, Frank I. Bennett, Chicago, Ill., James W. Converse, Chicago, Ill., Andrew Crawford, Chicago, Ill., Charles H. Wisner, residence unknown, Gertrude H. Hardin, Evanston, Cook County, South Chicago & Southern Railroad Company, Chicago, Illinois.

And your orator further states that the following persons own or claim as your orator is informed and believes an estate in fee in said lands or some part thereof, as follows: Elizabeth P. Thomas, Conrad N. Jordan, Andrew Crawford, Frank I. Bennett, James W. Converse, Charles H. Wisner, Gertrude H. Hardin, and the South Chicago and Southern Railroad Company, Unknown heirs and devisees of Charles D. Gilmore. And no other person to the knowledge and belief of your orator own or claim any estate in said lands or any portion thereof. And your orator further states that by the destruction of said records the title of your orator, as aforesaid, is rendered insecure and unsafe. In consideration whereof, and in accordance with the Statute in such case made and provided, to the end therefore that the said Elizabeth P. Thomas, Conrad N. Jordan, Frank I. Bennett, James W. Converse, Andrew Crawford, Charles H. Wisner, Gertrude H. Hardin, South Chicago & Southern Railroad Company, and William Bush, James W. Smith, John E. Curtis, Samuel Davis, Thomas C. Wilkerson, Solomon Field, Unknown heirs and devisees of Charles D. Gilmore, and All Whom it may concern, whom your orator makes party defendants to this Petition, may to the best and utmost of their respective knowledge, information, remembrance and belief, full, true and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto; and that the title to said lands may be confirmed and established in your orator, Charles B. Shedd, and that your orator may have such other and further relief in the premises, as the nature of the circumstances of this case require, and to your Honors shall seem meet.

Your orator prays that a writ of summons be issued out of this Court, directed to the Sheriff of said Cook County to execute, commanding him to summon said defendants, and "all whom it may concern" to be and appear before this Court on the first day of the August Term thereof to be held in the Court House in Chicago on the third Monday of August, 1888, and then and there, full, true and perfect answer make to all and singular the matters and things in this Petition contained, and your orator will ever pray etc.

CHARLES B. SHEDD.

S. S. Gregory & Ullman Strong, Solicitors and of Counsel.

STATE OF ILLINOIS, } ss.
County of Cook. }

Charles B. Shedd, being duly sworn, on oath says that he is the petitioner who subscribed the foregoing Petition; that he has heard the same read and knows the contents thereof; and that the same is true in substance and in fact, to the best of his knowledge, information and belief.

CHARLES B. SHEDD.

Subscribed and sworn to before me this 29th day of June A. D. 1888.

ULLMAN STRONG,
Notary Public.

(L. S.)

[Endorsed: "Filed in Circuit Court, Jun. 29, 1888. Henry Best, Clerk."]

Petition of Charles B. Shedd in No. 443 B. R.

To the Honorable, the Judges of the Circuit Court of Cook County, Illinois, in Chancery sitting:

Your petitioner, Charles B. Shedd, represents and shows unto your Honors that he is the owner in fee simple of lands and premises situate in said County and State described as follows, to-wit: the fractional South-west quarter of fractional Section Twenty (20) in Township Thirty-seven (37) North, Range Fifteen (15) East of the Third Principal Meridian, (including and embracing the west half of said south-west quarter, the south half of the east half of said south-west quarter, and lot two (2) of the said south-west quarter, according to and as described in the survey of said lands by the officers of the United States General Land Office in the year 1874).

Petitioner further represents and shows your Honors that his title thereto is derived as follows: On the first day of March A. D. 1850, Horatio B. DeWitt became the owner thereof by patent from the United States duly executed and delivered, and so remained the owner thereof until the third day of October A. D. 1881.

That afterwards, to-wit: on the said third day of October, 1881, the said Horatio B. DeWitt conveyed the said land and premises by making and delivering a good and sufficient deed of conveyance thereof to Charles H. Mitchell.

That afterwards, to-wit: on the second day of March, 1883, the said Charles H. Mitchell conveyed the undivided one-fourth part of said lands and premises by making and delivering a good and sufficient deed of conveyance thereof to Hugh L. Mason.

That afterwards, to-wit: on the Twenty-ninth day of May, 1883, the said Charles H. Mitchell conveyed the undivided one-half part of said land and premises by making and delivering a good and sufficient deed of conveyance thereof to Lizzie Prescott.

That afterwards, to-wit: on the Twelfth day of September, 1883,

the said Charles H. Mitchell conveyed his remaining interest and title to said lands and premises by making and delivering a good and sufficient deed of conveyance thereof to Nellie J. Mitchell.

That afterwards, to-wit: on the Twenty-second day of December, 1886, said Hugh L. Mason and the said Nellie J. and Charles H. Mitchell her husband, conveyed their respective interest and title to said lands, being the two undivided one-quarter parts thereof, by making and delivering good and sufficient deeds of conveyance thereof to your petitioner, Charles B. Shedd, and that afterwards on the Twenty-seventh day of February, 1888, the said Lizzie Prescott joined by her husband also conveyed the undivided one-half of said lands and premises by making and delivering a good and sufficient deed of conveyance thereof to petitioner, Charles B. Shedd.

Petitioner further represents that the foregoing shows and is a direct and continuous claim of title from the United States to your petitioner, and so your petitioner claims to be and is thereby the owner of said lands and premises in fee simple.

Petitioner further represents that in addition to the foregoing chain of title above set forth, the records of the Recorder's Office of said Cook County show a conveyance by deed of said lands and premises by the said Horatio B. DeWitt to one John N. Wisner, which said deed it appears bears the date the Fifth day of April, 1873, and filed for record February the sixth, 1874.

Petitioner further represents that on the Fifth day of August, 1882, the said John N. Wisner duly conveyed said lands and premises by making and delivering a deed of conveyance thereof to the said Charles H. Mitchell, or at least conveyed whatever interest the said Wisner had acquired in and to said lands and premises prior to the date last mentioned and by virtue of a deed from said DeWitt to him, said Wisner, as aforesaid.

Petitioner further represents that on or about the Tenth day of October, 1871, the public Records of said Cook County were wholly destroyed by fire, and especially the record of the said patent to Horatio B. DeWitt.

Petitioner further represents that Conrad N. Jordan, John I. Bennett, Frank I. Bennett, J. Ensign Fuller, Henry M. Alexander, Ashbell Green, Gertrude H. Hardin, Treat Campbell, the South Chicago and Southern Railroad Company, The Cook County Canal and Dock Company, William K. Reed, each claim some estate in fee simple in said lands, or some part thereof, but what parts respectively petitioner is not informed.

Petitioner further represents that one Jabez G. Smale is in possession of a portion of said land, and the said South Chicago and Southern Railroad Company also is in possession of a part of said lands, using the same as a right of way for said railroad, and that no other person or persons are in possession of said lands, or any part or portion thereof, or have or make any claim to the fee of said lands or any part thereof.

Petitioner further represents that the said lands and premises

have been conveyed, and the deeds thereof recorded in the office of the Recorder of Deeds of said Cook County, since the time of the destruction of said records as aforesaid, and prior to the time of the filing of this petition to the persons respectively hereinafter named, whose respective residences are as follows:

J. Ensign Fuller, Residence New York City. Conrad N. Jordan, Residence New York City. Henry M. Alexander, Residence New York City. Ashbell Green, Residence New York City. Gertrude H. Hardin, Residence Evanston, Illinois. Frank I. Bennett, Residence Chicago, Illinois. William K. Reed, Residence Chicago, Illinois. Treat Campbell, Residence Chicago, Illinois. John I. Bennett, Residence Chicago, Illinois. The Chicago and Southern Railroad Company, Chicago, Ill. The Cook County Canal and Dock Company, Residence, Chicago, Illinois.

Petitioner therefore makes the said J. Ensign Fuller, Conrad N. Jordan, Henry M. Alexander, Ashbell Green, Gertrude H. Hardin, Frank I. Bennett, William K. Reed, Treat Campbell, John I. Bennett, The South Chicago & Southern Railroad Company, the Cook County Canal & Dock Company, Jabez G. Smale and all others whom it may concern, parties defendant to the petition, and prays that they may each and every and respectively be required to answer the same, but not under oath, their and each of their oaths respectively being hereby expressly waived.

Wherefore in tender consideration of the premises, and in pursuance to the statute in such cases made and provided, petitioner prays that his title to said lands and premises be establised and confirmed to him in fee simple free from liens and incumbrances of any and every kind. And that petitioner may have such other and further relief in the premises as the nature of the circumstances of this case require, and to your Honors shall seem meet.

Petitioner prays that a summons in chancery be issued out of this Honorable Court directed to the Sheriff of Cook County to execute, commanding him to summon the said J. Ensign Fuller, Conrad N. Jordan, Henry M. Alexander, Ashbell Green, Gertrude H. Hardin, Frank I. Bennett, William K. Reed, Treat Campbell, John I. Bennett, the South Chicago & Southern Railroad Company, the Cook County Canal & Dock Company and Jabez G. Smale

And to all whom it may concern, to be and appear before this Honorable Court on the first day of the August, A. D. 1888, term thereof, to be held in the Court House in the City of Chicago, Illinois, on the third Monday of August, 1888, and then and there full, true and perfect answer make as aforesaid to all and singular the matters and things in this petition contained, and your petitioner will ever pray, etc.

CHARLES B. SHEDD,
Petitioner.

WILLIAM PRESCOTT,
Solicitor for Petitioner.

STATE OF ILLINOIS, } ss:
County of Cook. }

Before me, Richard McConnell, a Notary Public, within and for said County, personally appeared Charles B. Shedd, and being by me first duly sworn, upon his oath states that he is the petitioner who subscribed the foregoing petition. That he has heard read the same and knows the contents thereof, and that the same is true in substance and in fact as he verily believes.

CHARLES B. SHEDD.

Subscribed and sworn to before me this 30th day of June, A. D. 1888.

RICHARD McCONNELL,
Notary Public.

(Seal)

(Endorsed) Filed June 30th, 1888. Henry Best, Clerk.

On the 15th day of April, A. D. 1889, the following proceedings, as appears from the Transcript from said Circuit Court, appear of record in said Circuit Court, to-wit:

CHARLES B. SHEDD
v.
ELIZABETH P. THOMAS *et al.*
} *B. R. 442.* *Petition to confirm title.*

CHARLES B. SHEDD
v.
J. ENSIGN FULLER *et al.*
} *B. R. 443.* *Petition to confirm title.*

On motion of John I. Bennett, Esq., it is ordered that cause No. 443 be and the same hereby is consolidated with No. 442 and hereafter to be considered as one case.

Answer of Gertrude H. Hardin in No. 442.

(*Asterisks in this as in other instances following indicate the omission of parts deemed immaterial or non-essential to the present record.*)

Separate answer of Gertrude H. Hardin to the original petition of Charles B. Shedd, petitioner, filed in this cause June 29, 1888.

This defendant saving and reserving unto herself now and at all times hereafter all manner of benefit and advantage of exception which can or may be had or taken to the said petitioner's petition, and reserving the right to treat this answer as a demurrer on the final hearing, leave of court having been obtained for that purpose, for answer thereto or to so much thereof as this defendant is advised is in any wise material or necessary for her to make answer unto, answering says that she denies that the said petitioner is the owner in fee simple of fractional Section twenty-nine (29), Township thirty-seven (37) North, Range fifteen (15) East of the Third Principal Meridian, except as hereinafter stated.

This defendant further answering says that as to the peti-

tioner's deraignment of title from the Government of the United States by various mesne conveyances to the said petitioner, as stated in said petition, including all allegations therein as to certain legal proceedings taken with reference to the estate of Stephen A. Douglas, deceased, this defendant is uninformed except from the allegations of said petition, and therefore denies the same and calls for strict proof thereof.

This defendant further admits that the public records of Cook County were on or about the 9th day of October, 1871, destroyed by fire, but as to the destruction of the various instruments mentioned in the petitioner's petition, this defendant is uninformed except by the allegation of said petition and therefore denies the same and calls for strict proof.

This defendant further answering says that as to the allegations of said petition, as to the persons in possession or claiming to be in possession of the said premises, and the nature and extent of such possession, this defendant is uninformed except from the allegations of said petition and therefore denies the same and calls for strict proof; but this defendant denies that said possession of the said premises, if any such there be, should be allowed to conflict with the rights of this defendant as hereinafter stated. * * *

This defendant further answering says that if the said petitioner is entitled to any portion whatever of the said fractional Section twenty-nine (29), more fully described in his said petition, that said title is limited to a tract of about seven acres in the southwest corner thereof, together with such rights as the law confers upon him to the bed of the lake abutting upon said seven acres, and that said petitioner is only entitled to such portions of the lake bed as may not conflict with the rights of other shore owners, and more especially with the rights of this defendant.

This defendant further answering states that for the sake of brevity and certainty and in order to avoid incumbering the record in this cause with unnecessary repetition this defendant hereby adopts the statements and allegations of that part of her answer filed in the cause, which by order of court has been consolidated herewith and which is known as Charles B. Shedd vs. J. Ensign Fuller et al. and also as No. 443 Burnt Record; the same being an answer to the original petition of said Charles B. Shedd (the parts adopted being hereinafter shown in said answer).

This defendant further answering insists that it would be inequitable and unjust for this Honorable Court to confirm the title of the petitioner to the whole of said Section twenty-nine (29), as prayed for in his said petition, because this defendant is the owner in fee of a large portion of said Section twenty-nine (29), the same being a part of the bed of said lake, by reason of her ownership in fee of lands adjoining the said lake as hereinbefore stated, a large portion of the bed of said lake being vested in this defendant's ancestor by reason of his purchase as aforesaid of said lands bounded as aforesaid by said lake; and this defendant insists that if a decree should be entered by this Honorable Court upon the said petition

that a fair adjustment of the rights of the said petitioner and this defendant should be made by the Court and that a part of the bed of the lake, as shown upon the plat of the original survey by the officers of the General Land Office of the United States in the year 1835, and lying within said Section twenty-nine (29), if the lines of said original survey were extended into said lake, should be fairly divided between said petitioner and this defendant.

This defendant further answering says that it would be inequitable that the title of the petitioner should be held by this Court in this cause to extend throughout the said Section twenty-nine (29) in its entirety, because this defendant has already in other causes taken steps to confirm her title to that portion of the bed of said lake, including a portion of said Section twenty-nine (29), to which she is entitled as riparian proprietor by reason of her ownership of the lands above described bounded upon said lake as aforesaid.

This defendant further answering states that she adopts that part of the said answer to the said original petition of the said Shedd, and each and every of the allegations thereof commencing, &c. * * * (See said answer as hereinafter set out.)

This defendant denies all and all manner of unlawful combination and confederacy wherewith she is by the said petition charged, without this that there is any other matter, cause or thing in the petitioner's said petition contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and prays to be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

GERTRUDE H. HARDIN,
By SWETT & KNIGHT,
Her Solicitors.

SWETT & KNIGHT,
Solicitors for said Defendant.

STATE OF ILLINOIS, } ss.
County of Cook. }

Isaac N. Hardin, being first duly sworn, deposes and says that he is the Agent of Gertrude H. Hardin; that he has read the above answer and knows the contents thereof, and that the same are true of his own knowledge except as to such matters as are therein stated upon information and belief, and as to such matters he believes it to be true.

ISAAC N. HARDIN.

Subscribed and sworn to before me this 26th day of April, A. D. 1889.

T. D. KNIGHT,
Notary Public.

(Seal)

(Endorsed) Filed May 6th, 1889. Henry Best, Clerk.

Answer of Gertrude H. Hardin in No. 443.

The separate answer of Gertrude H. Hardin, one of the defendants to the bill of complaint of Charles B. Shedd, complainant.

This defendant saving and reserving unto herself now and at all times hereafter all manner of benefit and advantage of exception which can or may be had or taken to the said petitioner's petition, and reserving the right to treat this answer as a demurrer on the final hearing, leave of court having been had thus to do upon the overruling of the demurrer in this cause, heretofore filed by this defendant, for answer thereto or to so much thereof as this defendant is advised is in anywise material or necessary for her to make answer unto, answering denies that said petitioner is the owner in fee simple of the lands described in said petition, to-wit: the fractional South West quarter (¼) of fractional Section Twenty (20) in Township Thirty Seven (37) North, Range Fifteen (15) East of the Third (3rd) Principal Meridian (including and embracing the West half of said South West quarter, the South half of the East half of the South West quarter, and Lot two (2) of the said South West quarter, according to and as described in the survey of said land by the officers of the United States General Land Office in the year 1874).

This defendant further answering says that as to petitioner's deraignment of title to said fractional tract set forth in said petition, * * * this defendant is not advised, except by the said allegations of said petition, and therefore denies each and every of said allegations and demands that full proof be made thereof.

" * * * *

This defendant admits that the records of said County were destroyed by fire on or about the 9th day of October, 1871. * * *

This defendant further answering says that if the said petitioner is entitled to any portion whatever of said South West fractional quarter of said Section Twenty (20), more fully described in his said petition, that said title is limited to a tract of 4 and 53/100 acres in the North East corner of said South West fractional quarter, together with such rights as the law confers upon him to the bed of the lake abutting upon said 4 and 53 100 acres, and that the said petitioner is only entitled to such portions of the lake bed as may not conflict with the rights of other shore owners, and more especially with the rights of this defendant.

This defendant further answering says that she is the owner in fee of the East fraction of the South West fractional quarter, and the South East fractional quarter of Section nineteen (19), Township Thirty-seven (37), Range Fifteen (15), East of the Third Principal Meridian, situate in the County of Cook, and State of Illinois, and also the North East fractional quarter of Section Thirty (30) lying directly South of and adjoining the South East fractional quarter of Section nineteen (19), and also the East half of the South East quarter of said Section Thirty (30), lying directly South of

and adjoining the East half of the North East quarter of said Section Thirty (30) in said Township, thus giving to this defendant a continuous strip of land extending North and South for a distance of one mile and a half, and extending nearly the entire length from North to South of the said lake, which is marked upon the plat of the original survey by the officers of the General Land Office of the United States, made in the year 1835 as "Navigable Lake," but which has since become commonly known as Wolf lake, excepting therefrom the right of way of the South Chicago and Southern Railroad Company running in a northerly and southerly direction through said fractional South East quarter of Section Nineteen (19) and said North East quarter of said Section Thirty (30), and also a strip of land commencing at the intersection of the South line of said Section Nineteen (19) with the Calumet River and running North along the said Calumet River for a distance of 400 feet, and extending due eastward in a uniform width of 400 feet to the center of said lake, which last mentioned strip of land has been conveyed by this defendant to the Cook County Canal and Dock Company, one of the defendants herein.

This defendant further answering says that on, to-wit: May 20, 1841, the United States by its patent of that date conveyed all the above described premises to John Holbrook, then living, but since deceased, who was the father of this defendant; that by deed dated July 3, 1844, the said John Holbrook, his wife joining him in the deed, conveyed to one William Canterbury, a certain portion of said above described premises, or attempted so to convey the same, the portion so conveyed or attempted to be conveyed, being described in the deed thereof as "an undivided half, to-wit: the South half," of all of the premises hereinabove described; that whatever title, if any, vested in said Canterbury, under said conveyance, the same has since been acquired by this defendant by *mesne* conveyances; that about December first, 1866, the said John Holbrook died intestate, seized of all the residue of said above described premises, not embraced in the before mentioned conveyance to said Canterbury, leaving him surviving this defendant, and his wife, Betsy N. Holbrook, mother of this defendant, and his sole heirs-at-law; that the personal estate left by the said John Holbrook, was sufficient to satisfy, and did satisfy and discharge, all claims against his estate, so that the title of the said John Holbrook to the premises hereinabove described, so far as the same remained in him at his death, descended to and vested in this defendant and said Betsy N. Holbrook, the interest of the said Betsy N. Holbrook, being her dower interest only, which said dower interest the said Betsy N. Holbrook thereafter, by deed duly recorded in Cook County, released to this defendant; that the said Betsy N. Holbrook has since deceased leaving this defendant her sole heir; and this defendant shows that through the conveyances aforesaid and by the descent of said property upon the death of

said John Holbrook, this defendant became vested with the title of all of the premises hereinabove described.

This defendant further shows that in or about the years 1834 and 1835, the proper department of the United States Government, through its Surveyor General, caused to be surveyed fractional Township Thirty seven (37), North Range Fifteen (15) East of the Third Principal Meridian, which land is situate in the County of Cook, State of Illinois, from which said survey, and the field notes thereof, the said United States caused to be made, in the usual manner, maps and plats in triplicate, which were duly approved and filed, one in the General Land Office at Washington, District of Columbia, one in the office of the United States Surveyor at St. Louis, Missouri, and one, as this defendant is advised, in the land office at Chicago, Illinois,; that said plat recorded or filed in the General Land Office at Washington, D. C., as an original record, has remained unchanged and unaltered in said office from thence hitherto; that said plat of said survey filed in the Land office at Chicago, there remained until about the year 1855, when, all of said land having been sold, said office at Chicago was abolished, and the records there, including said map, were removed to Springfield, Illinois, and there remained unchanged and unaltered until about the year 1876, when said office at Springfield was abolished, and the records thereof, including said map or plat were removed and filed in the office of the Commissioner of the General Land Office at Washington, where they have remained since hitherto; that said Land office at Chicago was caused to be opened in or about the year 1831 for the sale of the Government lands in the State of Illinois, including said fractional Township Thirty seven (37), and said plat was when made deposited in said office for the purposes of reference, and information to purchasers of land from the Government of the United States, and was so used, and referred to by such purchasers until the final disposition of the lands aforesaid by the Government.

This defendant further shows that said triplicate plats made from the field notes of said survey were identical, so that whichever plat or map was examined by a contemplating purchaser, the same representation was thereby made as to the location, character and physical features of the land in reference to which examination was made, the purpose of the making of said plats being to guide purchasers or those contemplating purchase; and said plats or maps operated in fact as a representation by the United States to all parties dealing with reference to said lands, as to the location, character, and features of said lands as aforesaid, all purchasers having full right to rely upon said plats so made and recorded as aforesaid; and this defendant shows that in point of fact the said John Holbrook, in making his purchase of said lands from the United States Government, so made by him as aforesaid, did rely upon the said plats or maps, and also this defendant shows that the said Government of the United States in making its patents of said

lands to said Holbrook, as aforesaid, made the same with express reference to said map or plat, as will appear from an inspection of said patent, a duly exemplified copy of which this defendant offers to produce here in court, the grant of said lands in said patent being therein expressed as being made, "according to the official plat of the survey of said lands, returned to the General Land Office by the Surveyor General." * * *

This defendant further shows, as matter of fact, that the said body of water shown by said plat of said survey as "Navigable Lake," is a body of water, one of a chain of small lakes, lying partly in the State of Illinois, and partly in the State of Indiana, which are connected with each other, and are also, in a state of nature, connected with Lake Michigan; that said so-called "Navigable Lake" is now known or designated generally as Wolf Lake, although the Westerly portion of said water, upon which the lands purchased by said Holbrook are shown as bordering by said plat or map, is now commonly called Hyde Lake, while to the east of said Wolf Lake in the State of Indiana is another body of water now commonly known or designated as Lake George; all of said bodies of water being connected together, Lake George connected with Wolf Lake by a narrow channel, while the said so-called Hyde Lake and Wolf Lake are, at ordinary stages of water, practically one continuous sheet of water, presenting certain irregularities of shore line; and all of such lakes having and maintaining substantially the same general water level. * * *

This defendant further shows that in a state of nature said Wolf Lake has an outlet to the Northeast into Lake Michigan through what is now known as Wolf River, but which outlet was upon the Original Government survey thereof, shown simply as an extension or arm of that part of what is now known as Wolf Lake which lies within the State of Indiana. Said Wolf River has a distinctly defined channel, and shores, with a depth of water therein at the ordinary stages of from six to fourteen feet, with a total length of about one and one half miles and a width varying from one hundred to several hundred feet. The outlet of said Wolf River into Lake Michigan, however, is subject to be interrupted by the formation of a sand bar at the mouth of said river after storms or other disturbances in Lake Michigan; and as a matter of fact the connection between the water of said Wolf Lake and Lake Michigan through Wolf River is very frequently broken for the reason aforesaid. This defendant further shows in this respect that the formation of said bar interrupting the outlet of said Wolf River is of greater frequency in later years, as this defendant is informed, and believes, on account of the location of the tracks of the Pittsburgh and Ft. Wayne, the Michigan Southern, and the Baltimore and Ohio Railroads, which run substantially parallel with the shore of Lake Michigan, and cross Wolf River near the mouth thereof.

This defendant further shows that, as shown by the said map or plat of the original survey, there also existed at the time of making

such survey, and still exists, a narrow channel connecting said so-called navigable lake from its westerly shore or border with the Calumet River, shown on said map or plat as the Little Kalamick; said channel leaving the westerly border of said Lake near the east and west half section line of section thirty (30), and running thence in a Westerly and Northerly direction to its junction with said Calumet River; that said Calumet river runs from said point in a Northerly and slightly Easterly direction until it empties into Lake Michigan, near the boundary line between the States of Illinois and Indiana.

This defendant shows that thus, in a state of nature, the level of water in said so-called "Navigable Lake," and in said chain of lakes was substantially and measurably dependent upon the level of water in Lake Michigan, with which it has two connections as aforesaid, the principal connection through Wolf River being subject to interruption by the formation of bars as aforesaid, but the minor connection through Calumet River being substantially free from liability to such interruption.

This defendant further shows that the level of water in Lake Michigan, as shown by observations taken for a period of years, is subject to considerable fluctuation, the extreme variations being through an altitude of about six feet, such variations as to Lake Michigan being caused principally by the direction and violence of the prevailing winds; that when the wind blows strongly, and for a considerable period of time from the South, the waters of said Lake in its vast extent from the North to South of more than three hundred miles, are carried gradually toward the North, whereby the level in the Southerly end of said Lake is liable to be considerably reduced; while, on the contrary, prevailing and strong Northerly winds produce exactly the opposite result, and by the same process raise the level of water in the Southerly end of said Lake; that the mouth of said Calumet River and of said Wolf River are both near the Southerly extremity of said Lake Michigan, and that the level of water in both of said rivers is largely determined by the condition of the level of water in Lake Michigan, save as the operation of said level is measurably interfered with by the formation of the bar at the mouth of Wolf River hereinabove referred to. This defendant shows, however, that owing to the porous nature of the substance composing said bar it is a fact if the level of Lake Michigan is for any considerable period of time by reason of the prevalence of the winds or otherwise considerably below the level of waters in Wolf Lake; said waters, although the natural flow thereof through said Wolf River may be interrupted, yet pass with considerable rapidity by the process of seepage or percolation, so that, as this defendant is informed and believes, there is never any very great difference in the level of water in Lake Michigan and in said Wolf Lake, maintained for any considerable period of time, this result being contributed to in a measure by the Westerly outlet of said Lake through Calumet river hereinabove

referred to, and which is free from the interruption to which said Wolf River is subjected, but which originally and until a recent time (said outlet having been by other parties, and with which defendant has not been connected, within the last three years artificially widened and deepened in that part lying West of defendant's land, and in the North West quarter of Section thirty (30), and by extending said outlet across the west fraction of the S. E. ¼ of Section (30) into said Lake) was too small to afford a means of very rapid equalization of levels in these contiguous bodies of water. It may be added that the level of water in Wolf Lake, before said outlet was artificially widened and deepened, was also subject to a greater degree than the water in Lake Michigan to the operation of evaporation in long continued periods of drouth and of heavy rains, particularly in the time of spring freshets. But this defendant shows that the said "Navigable Lake" is in the manner hereinabove stated permanently connected with the waters of Lake Michigan, and that, however extreme may be the drouth, there is and was always an abundance of water in said Lake; while no matter how many may be the freshets or prevailing rains, the surplus in said Lake is always liable to be carried off through natural channels into Lake Michigan; that as a matter of fact the level of water in Lake Michigan is never so reduced that it is not above the level of the general bottom of Wolf Lake.

This defendant further shows that there is established, and used by all surveyors in Cook County, a level of Lake Michigan, which is called "*datum;*" which level is about one foot above extreme low water in Lake Michigan, and above five feet below extreme high water; that the average level of Lake Michigan as observed and determined through a great number of years, is about one foot and 8/10 above *datum*, being about two feet and 8/10 above extreme low water, and about three feet and two-tenths below extreme high water; or being practically half way between high water and extreme low water of said lake. This defendant further in this behalf shows that if the level of water in Wolf Lake standing at about two feet and 2/10 above *datum*, being about 4/10 of a foot above the average level of Lake Michigan, the water in said Wolf Lake extends out fully and in all directions to the margin thereof as reported in the field notes of the Government survey, and as shown upon the plats of said survey, hereinabove referred to; and that with the water in Wolf Lake standing at one foot and 8/10 above *datum*, or at the average water level of Lake Michigan, said water extends approximately to the marginal line of said Wolf Lake, as found at the time of the making of said survey, as evidenced or exhibited in the plats thereof above referred to—so near to said marginal line as shown by said plats that whatever little exposed portion of the bed of said lake may be left by the subsidence of said water between the said average level of Lake Michigan and the water line as established at the time of, and by, the survey and plats aforesaid, is thoroughly saturated with

water, marshy and utterly unfit for cultivation, and subject to continuous overflow by and from slight rise in the waters of Wolf Lake, whether by waters setting in from Lake Michigan or by heavy rainfalls or the melting of snow and ice in connection with Spring freshets.

* * * * *

This defendant further shows that at the time of the original survey made by the Government Surveyor, in 1834 and 1835, as aforesaid, the true shore line of said "Navigable Lake" was shown with substantial correctness upon said plat, and that such was the true shore line thereof at the time of the purchase of said John Holbrook of the lands hereinabove described.

This defendant is advised and believes that—*Amendment filed Aug. 13th, 1891, from (a) to (b)*—(a) it is sometimes claimed as to the body of water shown on such plat as a lake that (b) at the time of said original survey there was a narrow spur or promontory of land extending in a Southwesterly direction from what is shown by the said plat as the Southwest fractional quarter of Section Twenty (20).—*Amendment August 13, 1891, from (a) to (b)*—(a) In describing the same with reference to the time of the commencement of this suit respondent says that it is true that at certain stages of the water, said (b) spur or promontory of land extends about half way across the space shown by the plat as covered by the "Navigable Lake" towards the point of land comprised of the East fraction of the South East quarter of Section thirty (30), and fractional Sectiom twenty-nine (29), as shown by the said plat, with the exception that about half way down the extent of said spur of land stretching from said section twenty(20), as aforesaid, there was an opening or space through which the water passed at ordinary stages, so that at such stages of water the lower part of, what at low water was a continuous spur of land or promontory of the extent hereinabove stated would be an island, a considerable portion of which would be subject to entire submergence in times of high water, said promontory thus extending into the water, much like the dorsal fin of a fish, was extremely narrow, in some places not to exceed ten or fifteen feet in width and in some places narrower, and the whole presenting an appearance like an artificial railroad bed except in its irregular shape, in many places in ordinary stages of water entirely submerged and the greater part subject to entire submergence in higher stages of water, and the whole of an area—*Amendment August 13, 1891, from (a) to (b)*—(a) if unsubmerged in part or otherwise at the time of the original survey (b)—entirely insufficient to warrant the cost of meandering and estimating its area at the price of Government land at $1.25 per acre; and this defendant charges that the survey of said promontory or spur of land was omitted by the surveyor in pursuance of what this defendant is informed and believes was a general plan in such survey, never to survey promontories or spurs of land of this character when the amount of land estimated to be embraced by such survey would not

be of value to the Government at the rate of $1.25 per acre, the price of Government lands at that time, sufficient to pay the expenses of such survey; and this defendant in fact charges that the amount or unsubmerged land in the promontory or spur above referred to at the price of Government land was not at the time of such survey of value sufficient to make it an object to make the survey thereof, and that, therefore, the survey of the same was omitted by said surveyor. This defendant also is advised and believes it to be true that at low stages of water in said "Navigable Lake" there would also be shown a small island or elevation about the intersection of the East section line of Section thirty (30), extended with the half section line East and West of said Section thirty (30), which is now commonly known as Fogli's Place or Elm Island, and which little island is subject to complete submergence in times of high water, except as the same may be protected, in some portion of it, by artificial dikes or other structures. This defendant further shows that she believes it to be true that the water between the lower extremity of this spur above referred to and the point of land comprising fractional section twenty-nine (29), and the East fraction of the South East fractional quarter of Section thirty (30), above referred to, was and is shallower than the water on the East and West thereof, but in the entire extent of said shallow portion of the lake bed the water in ordinary stages, and in high water, flows unobstructed, so that it becomes one body of water from this defendant's land upon the West through and across the state line between Indiana and Illinois, and the Easterly shore of said lake in Indiana; the existence of this shallow portion of the lake bed above described causes, in times of extreme low water, an almost total disconnection between the waters in the Westerly part of the so-called "Navigable Lake" and the waters in the Easterly part thereof, which partial and occasional division of the waters is the cause of the westerly portion of the said so-called "Navigable Lake" having come to be known by a name differing from that applied to the water lying east of said shallow portion of the lake bed, but this defendant further charges that said shallow portion of the bed has been so changed by the process of vegetable deposit and muck above the sand bottom, and by the shifting of the bottom, or shallowing influences upon this portion of the bed caused by the projecting promontory or point of land, that the same has not now the same depth or conformation which existed at the time of the original survey, and at the time of the purchase by this defendant's ancestor hereinabove referred to. This defendant shows, however, that the natural condition of said water has not made, as yet, two separate or distinct bodies of water, but that they are in truth and in fact one common body of water, flowing from this defendant's land on the west to and beyond the Indiana State line in all ordinary stages of water without interruption save from said Elm Island, and from that portion of the promontory or spur of land hereinabove described, which is ordinarily above water when the water

stands at its usual and customary stages, and from the embankment recently and within the last three years built through and across said shallow part of the lake bed by the South Chicago and Southern R. R. Co.; that although in point of fact, by reason of the influence of said promontory which causes the water of said lake to wash the said bottom continually on and to the shallows, and by rank vegetation, there is in progress a gradual filling in of the shallow portion aforesaid and of the westerly portion of said "Navigable Lake," which westerly portion is now commonly known as Hyde Lake, yet the general bottom of said portions of the lake below the accumulated vegetable deposit is sand, and of the same general nature as the bottom of the residue of said "Navigable Lake" and is susceptible of easy dredging; and that the keeping open of said communication or flowing of waters over the shallows between said promontory connected with Section twenty (20) and said point of land comprising fractional section twenty-nine (29), etc., is not only a matter of right to this defendant, and essential to the beneficial enjoyment by her of her rights as a riparian proprietor bounded on said "Navigable Lake," but it is also essential to the general uses for purposes of navigation of said "Navigable Lake", in order to give to it the benefit of a connection with Lake Michigan through said Calumet River by the natural channel hereinabove referred to, dredged out to adequate and proper depth for successful use, and in connection with the purposes of navigation.

This defendant further answering insists that it would be inequitable and unjust for this honorable court to confirm the title of the petitioner to the whole of the South West quarter of said Section twenty (20) as prayed for in his said petition, because this defendant is the owner in fee of a large portion of the said South West quarter of said Section twenty (20), the same being a part of the bed of the said lake by reason of her ownership in fee of lands adjoining the said lake in the South East quarter of said Section nineteen (19), a large portion of the bed of said lake having vested in this defendant's ancestor by reason of his purchase as aforesaid of said lands in said South East quarter of said Section nineteen (19) bounded by the said lake; and this defendant insists that if a decree should be entered by this Honorable Court upon the said petition that a fair adjustment of the rights of the said petitioner and this defendant should be made by the Court, and that part of the bed of the lake as shown upon the plat of the original survey by the Officers of the General Land Office of the United States, in the year 1835, and lying within the South West quarter of said Section twenty (20), if the lines of said original survey were extended into said lake, should be fairly divided between said petitioner and this defendant.

This defendant further answering says that it would be inequitable that the title of the petitioner should be held by this court in this cause to extend throughout the entire South West quarter of said Section twenty (20), because this defendant has already in

other causes taken steps to confirm her title to that portion of the bed of the said lake, including a portion of said South West quarter of said Section twenty (20), to which she is entitled as riparian proprietor by reason of her ownership of the lands above described bounded upon said lake as aforesaid.

This defendant on, to-wit: the 22nd day of December, 1882, filed her bill in chancery in this Court, which said bill had for its purpose the ascertainment and confirmation of this defendant's rights to the bed of the said lake. The said bill sets up in substance the facts much as above herein set forth, and makes parties defendant thereto the said petitioner and all other claimants to the bed of said lake. The purpose of said bill was and is to properly adjust the rights of the various shore owners mentioned in said bill to the bed of the said lake.

This defendant further answering says, that answers were filed to the said bill on behalf of various of the defendants, including the petitioner's grantor, and that cross-bills were filed in said cause by various of the defendants. The said cause, however, has been removed upon motion of the defendants in said cause to the United States Circuit Court for the Northern District of Illinois, where it is now pending and undetermined.

This defendant further answering says, that the said cause is ample in its scope to adjust the rights of the petitioner and this defendant and the other claimants to the bed of said lake and this defendant prays that no action of this Honorable Court may be taken which will prejudice her rights or standing in the said cause.

This defendant further answering says, that on to-wit, the 27th day of October, 1882, she brought five ejectment suits against parties claiming to be in possession of portions of the lake bed lying within the shore line as shown on the plat of the original survey of 1835 aforesaid, and including the said South West quarter of Section twenty (20) involved in this suit, and that said causes were removed upon motion of the defendant to the United States Circuit Court for the Northern District of Illinois upon the 18th day of November, 1882, and were afterward consolidated in said Court and a trial had before the Honorable Walter Q. Gresham, Judge of said Court, and that a judgment was entered in said causes upon the 18th day of January, 1886, resulting in certain findings and judgments in favor of this defendant, which findings and judgments now remain of record in said Court, and which will more fully appear by reference thereto, and which this defendant is ready to produce upon the hearing of this cause; that by the judgments aforesaid this defendant's right is established to have the waters of said lake as her Easterly boundary of said lands in Sections nineteen (19) and thirty (30) aforesaid at low water mark, and to follow said waters in their subsidence, it being in said cause especially found that owing to the operation of causes, such as are herein above set forth, the level of water in said lake is variable; but no low water line was fixed by the said court and such line remained undetermined;

but this defendant says that owing to the rise and fall of the waters in Lake Michigan, as hereinbefore set forth, all that portion of the bed of the said lake, lying west of the North and South centre lines of Sections twenty (20) and thirty-two (32) respectively, if extended through said lake is above *datum*, and that by reason thereof, when the waters of Lake Michigan reach *datum*, the low water mark of said lake will be at about the said North and South centre lines of Sections twenty (20) and thirty-two (32) if extended as aforesaid; and that when the waters of Lake Michigan are below *datum* that said portions west of said line would be entirely uncovered by water, and that by virtue of the said decision this defendant is the owner in fee of that portion of the bed of the said lake, as shown on the plat of the original survey by the United States Government in the year 1835, extending from her lands aforesaid to the said low water line, shown as aforesaid, to be the said center lines of said Sections twenty (20) and thirty-two (32) if extended, and this defendant says that according to said decision she is the owner in fee of a large part of said South West quarter of Section twenty (20).

This defendant further shows that she prayed an appeal from the said findings and judgments to the Supreme Court of the United States, where said cause is now pending, and this defendant insists that she is not limited by said low water line, but is the owner in fee of that part of the bed of said Lake extending from her said lands to the center thereof; and prays that no action may be taken or decree rendered by this Honorable Court which will prejudice this defendant's rights in the said suits which are still pending and undetermined in the Supreme Court of the United States. * * *

[Insertion following, ending with jurat dated August 5, 1891, shows Amendment filed Aug. 13, 1891.]

And this defendant further says, that prior to the survey by the United States first hereinabove mentioned, the proprietary right to the lands in question and to the lake bed, and as to the lake itself, was in the United States; that after such survey had been made, the lands in said Township 37 North, Range 15 East, were regularly brought into market in pursuance of the acts of Congress in such case made and provided; that those of the same bordering upon the body of water represented on the plat of the survey as a lake, including the lands embraced in the patent aforesaid to said John Holbrook, were entered or purchased from she United States; that the same were sold and granted by the United States according to the plat of the survey thereof returned to the General Land Office by the Surveyor General, and without any reservation on the part of the United States in respect to the lake bed or any part of the same; that such lake bed passed to the patentees or grantees from the United States; that such patentees or grantees and their assigns thereupon became and were seized of all the proprietary right in respect to the lake and lake bed which had pre-

viously been in the United States, and as such patentees were seized of the same in fee simple; that it is under this claim that respondent's rights arose and exist; and that the United States could not, after having so disposed of its proprietary rights, which passed under such patents, interfere in any manner with the rights of the said patentees, including the said John Holbrook. That therefore, as well as for other reasons, the attempted survey of the lake bed in 1874 was wholly unauthorized and irregular, and the entire action of the General Land Office of the United States on that subject, and in respect to the lake bed lands, was illegitimate, and without any jurisdiction or authority.

That the original survey made by the United States and represented by said plat was not subject to be superseded, set aside or changed after the United States sold and conveyed the lands aforesaid according to the plat of said survey; that the rights of the grantees of said lands or patentees from the United States were fixed by the Common Law, and that the method of adjustment of lines extending into the lake or through or over the body of water represented on said plat as a lake, was and is governed by said law, and by rules which are thereby established, giving effect especially to the length of the shore lines of the tracts granted by the United States bordering on said water according to the said plat. That under and by virtue of the patent aforesaid so issued to the said John Holbrook, respondent claims to the center of the lake as a part of the grant made by said patent of lands represented on said plat as bordering on said lake.

That said lake at the time of said original survey of said Township, and for many years thereafter, was the receptacle for the waters falling in a considerable district of country; that some of the conditions connected with it had greatly changed prior to 1874, which was a period of low waters in that vicinity, with reference to the conditions at which last mentioned time some suggestions have heretofore been made in the answer of this respondent; that it was not, and is not, within the power of this respondent to state all the conditions existing at the time of said original survey, but respondent believes it to be true that the said survey was fair and regular, and not liable to any just exception, and not subject to be rescinded or disregarded at the time of the supposed survey in 1874, as aforesaid, nor was said last mentioned survey, as respondent is advised and believes, predicated upon or attributable to any objection to the survey originally made as aforesaid, but said supposed survey of 1874 was based upon a false theory, that is to say, upon the theory that the meander of the lake under the original survey, although not represented on said plat, was a boundary line, and also on another false theory and assumption, to wit: that the United States had reserved the whole of the lake as bounded by said supposed meander line, and could convey the same irrespective of any interest which had been acquired by those who entered the lands bordering on the lake as represented upon said plat; upon

which false theories, as well as from various false suggestions, some of which have been detailed in the answer of this respondent, said survey of 1874 was ordered and attempted to be sustained by the General Land Office as aforesaid.

That in the ejectment suit (consolidated case) in which a trial was had before Honorable Walter Q. Gresham in the Circuit Court of the United States for the Northern District of Illinois, as stated in the answer of this respondent herein, it became necessary for the Court to determine what were the rights of this respondent in the lake bed, and on the hearing of said cause in the Supreme Court of the United States upon the coming on of such hearing at the October Term of said Court, A. D. 1890, in the matter of the writ of error sued out by respondent, wherein Conrad N. Jordan was defendant, the said Court determined that respondent was in respect to certain tracts therein under consideration, to wit: the S. E. Fractional Quarter of Section 19, and the N. E. Fractional Quarter of Section 30 aforesaid, entitled to judgment as of seizin in fee to the center of Wolf Lake; and that as to the S. E. Fractional Quarter of said Section 30, respondent was entitled to claim to the middle of the bay or projection of said lake in front of the East part of said Fractional Quarter Section, and accordingly the said Court gave judgment that the judgment previously entered by the Circuit Court of the United States for the Northern District of Illinois in said cause should be reversed, and such proceedings were afterwards had upon the remanding of said cause from the Supreme Court of the United States to said Circuit Court; that heretofore, to wit: on the 10th day of June A. D. 1891, said Circuit Court rendered judgment in favor of this respondent, that this respondent was entitled to recover possession of the premises described in the declaration in said cause, and found and adjudged that the South East Fractional Quarter of Section nineteen (19), the North East Fractional Quarter of Section thirty (3) and the East fraction of the South East Fractional Quarter of Section thirty (30) aforesaid were bounded by or situated on a lake which was and is non-navigable; and that respondent as owner of said several tracts had the rights of a riparian proprietor in respect to said lake, and that the seizin of respondent as to the two first named tracts extended to the center of Wolf Lake, and as to the East part of the South East Fractional Quarter of said Section thirty such seizin extended to the middle of the bay or projection of the lake in front of the same; as by said judgment, an exemplification of which will be produced, will more fully and at large appear.

And respondent says that said judgments in the Supreme Court of the United States and in the Circuit Court of the United States for the Northern District of Illinois, respectively, put a construction upon the patents aforesaid, as said courts might rightfully do, and held that the patent to said Holbrook gave rights to the lake bed to the center of the lake, and said judgments effectively denied

and repelled any right to rely upon or set up said survey of 1874 or the proceedings in the General Land Office connected with such survey; and respondent relies upon said final adjudication of said Ejectment Suit, and says it is true, as therein found that said lake, as represented on the plat of the survey according to which the patent was granted to said John Holbrook, was and is a non-navigable lake.

And respondent further says that heretofore, to wit: on the 20th day of December A. D. 1889, there was executed to respondent a certain deed of conveyance of that date by William H. Rand and wife and Nelson A. Steele and Margaret A. Steele in their own right, and as Executor and Executrix of the last Will and Testament of Charles R. Steele, deceased, whereby the grantors quit claimed and conveyed to respondent all their interest in that part of the South half of Section thirty (30) aforesaid, which was or is East of a line 80 rods East of and parallel with the North and South center line of said Section thirty (30); it being the intent of said grantors in said deed to bound the premises thereby granted upon the South by a line commencing at the South East corner of said Section and extending West on the Section line to a point 80 rods East of and parallel with the said North and South center line of said Section.

At page 17 of said answer in the fourth line from the bottom of the page insert after the word "that" the following: "It is sometimes claimed as to the body of water shown in such plat as a lake that"

Also at the beginning of page 18 strike out the word "which" and insert instead of the same, the following: "In describing the same with reference to the time of the commencement of this suit respondent says that it is true that at certain stages of the water said."

In the 19th line from the top of said page next after the word "area," insert the following: "If unsubmerged in part or otherwise at the time of the original survey."

GERTRUDE H. HARDIN,
By THOMAS DENT,
her Solicitor.

STATE OF ILLINOIS, } ss.
County of Cook. }

Isaac N. Hardin, being duly sworn, says that he is agent for the aforesaid respondent, Gertrude H. Hardin, and understands the contents of the foregoing amendments to her answer, which amendments he believes to be material. He further says that the statements embraced in the said amendments are true in substance and in fact as he verily believes.

ISAAC N. HARDIN.

Subscribed and sworn to before me this 5th day of August A. D. 1891.

JOHN H. HARDIN,
Notary Public.

(L. S.)

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith she is by the said bill charged, without this that there is any other matter, cause or thing in the petitioner's said petition contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct; and prays to be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

GERTRUDE H. HARDIN,
By SWETT & KNIGHT,
Solicitors for said defendant.

SWETT & KNIGHT,
Solicitors for said defendant.

STATE OF ILLINOIS, }
County of Cook. } ss.

Isaac N. Hardin being first duly sworn deposes and says that he is the Agent of Gertrude H. Hardin; that he has read the above answer and knows the contents thereof, and that the same are true of his own knowledge except as to such matters as are therein stated upon information and belief, and as to such matters he believes it to be true.

ISAAC N. HARDIN.

Subscribed and sworn to before me this 26th day of April, A. D. 1889.

[SEAL.] T. D. KNIGHT, *Notary Public.*

(Endorsed) Filed May 6th, 1889. Henry Best, Clerk.

Cross-Petition of Gertrude H. Hardin.

To the Honorable, the Judges of the Circuit Court of the County of Cook and State of Illinois. In Chancery Sitting:—

Your cross-petitioner, Gertrude H. Hardin, of the County of Cook and State of Illinois, respectfully represents unto your honors that on, to-wit: the 30th day of June, A. D. 1888, Charles B. Shedd, one of the defendants hereinafter named, exhibited in this Court his petition against one J. Ensign Fuller and other defendants hereinafter named, as well as your cross-petitioner, and that the said Charles B. Shedd also upon the 29th day of June, A. D. 1888, exhibited in this Honorable Court his petition against one Elizabeth P. Thomas and other defendants hereinafter named, as well as your cross-petitioner, which two above mentioned causes were by order of this Honorable Court upon the 15th day of April consolidated; and your cross-petitioner shows that said petitions above mentioned set forth in substance that the said Charles B. Shedd was the owner

in fee of the South West fractional quarter of Section twenty (20) Township thirty seven (37) North, Range fifteen (15), East of the Third Principal Meridian, in Cook County, Illinois, and of Fractional Section twenty-nine (29) in said Township, County and State, under a survey and platting of said lands by the Government of the United States in the year 1835, and that said petition purported to give a continuous chain of title from the United States of America to said petitioner; that certain of the records of the deeds of conveyance through which said petitioner claimed title to said lands had been destroyed by fire, and the said petition prayed that the title of said petitioner be confirmed to the entire South West quarter of said Section twenty (20) and to all of Section twenty-nine (29) if the congressional lines of said original survey were extended; that said petitioner made this cross-petitioner a party defendant to both of said petitions, and this cross-petitioner being duly served with process put in her answer thereto, as by the said petition and other pleadings and proceedings in the said cause now remaining on file and of record in this Honorable Court, reference being thereto had, will more fully appear.

Your cross-petitioner further shows unto your Honors that one John I. Bennett and one Conrad N. Jordan, two of the defendants to said original petitions, and who also claim the ownership of the bed of said lake by various mesne conveyances from the patents issued under a pretended and fraudulent survey hereinafter more fully described, after having filed their answers to said petitions, filed in said causes their cross petition, alleging in substance that the bed of said lake had been lawfully surveyed in the year 1874; that patents had been issued to the parties in said cross-petition named, and that said cross-petitioners by reason of the various conveyances in said cross-petition mentioned, had become the owners in fee of the lands claimed by said original petitioner; that the lands of said original petitioner were limited in extent and bounded by portions of congressional lines upon two sides of each of said tracts, and upon the inner or lake side thereof by a so-called meander line, and that said lands were not bounded by the waters of said lake; that the lands of said petitioner in the fractional South West quarter of Section twenty (20) consisted of only 4.53 acres, and in fractional Section twenty-nine (29) of only 7.37 acres; that said cross-petitioners had had possession by actual residence upon the said lands for a period of more than seven years prior to the filing of said original petitions, and that said cross-petitioners were entitled to the benefit of the Statute of Limitations, and pray that their title to the portion of the bed of said lake above described might be confirmed; that this cross-petitioner was made a party defendant to all of said cross-petitions, and a rule obtained upon her to answer the same: that she did answer said cross-petitions, all of which by the said cross-petitions and said answers and other files and proceedings now remaining of record in this

Honorable Court will more fully appear, reference thereto being hereby made.

Your cross-petitioner further shows unto this Honorable Court that the said causes having been consolidated as aforesaid, and all of said petitions and cross-petitions being similar in their general character, and involving substantially the same controversy and the same property, and much the same questions both of law and of fact pertaining to both of said causes, your cross-petitioner now exhibits to your Honors this her cross-petition to both of said original petitions, and prays the same benefit hereunder as though she had filed her cross-petition in each of said causes.

Your cross-petitioner represents and shows unto your Honors that she is the owner in fee simple of lands and premises situate in said County and State described as follows, to-wit: the South East fractional quarter and the East fraction of the South West quarter of Section nineteen (19); the North East fractional quarter and the East fraction of the South East fractional quarter of Section thirty (30), Township thirty-seven (37) North, range fifteen (15) East of the Third Principal Meridian.

Your cross petitioner further represents and shows unto your Honors that her title to the said lands is derived as follows:

Upon the 20th day of May, A. D. 1841, John Holbrook, the father of your cross-petitioner, became the owner in fee of said lands by patent from the United States duly executed and delivered, and remained the owner of the North one half thereof (The South half thereof having been conveyed as hereinafter stated) until the 1st day of December, 1866, when the said John Holbrook died intestate, leaving your cross-petitioner and her mother, Betsy N. Holbrook, widow of the said John Holbrook, his only heirs at law; that the personal estate of the said John Holbrook was more than sufficient to satisfy and did satisfy all of the debts against his estate; that your cross-petitioner and the said Betsy N. Holbrook, by operation of law, became seized of the said North half of said lands at the death of said John Holbrook, but the interest of the said Betsy N. Holbrook in and to said land was only a life estate or dower interest.

Your cross-petitioner further shows that the title to said lands was held by your cross-petitioner and said Betsy N. Holbrook from the death of said John Holbrook until the 12th day of November, 1869.

Your cross-petitioner shows unto your Honors that the said John Holbrook was the owner in fee of the South half of said lands from the date of his purchase thereof from the Government of the United States as aforesaid until the 3rd day of July, 1844, upon which date he conveyed the said South half by warranty deed duly executed and acknowledged, his wife joining therein, to one William Canterbury, which deed was duly recorded in the Recorder's office in the County of Cook upon the 21st of January, 1870, in Book

503, Page 59, and that the said Canterbury was the owner of said South half of said premises until the 25th day of April, 1849.

Your cross-petitioner further shows that upon the said 25th day of April, 1849, the said William Canterbury, by warranty deed duly executed and acknowledged, his wife joining therein, conveyed the said premises. * * * (Deraignment of title by mesne conveyances to cross-petitioner omitted.)

Your cross-petitioner further shows that upon the day of August 1884, by good and sufficient deed duly executed and acknowledged, her husband joining therein, she conveyed to the Cook County Canal and Dock Company, for the purposes of a canal to connect the Calumet River and the permanent waters of the lake commonly known as Wolf Lake, the South 400 feet of the East fraction of the South West quarter and the South 400 ft of the South East quarter of Section nineteen (19), and the South 400 ft of the South West quarter of Section twenty (20), if the congressional lines of the original survey of 1835 were extended into said lake, said strip extending from the Calumet River Eastward to the permanent waters of said lake, and into said waters so far as might be necessary for the purposes of navigation and for the construction of a canal. * * *

Your cross-petitioner further shows unto your Honors that the public records of the said County of Cook, on or about the 9th day of October, 1871, were totally destroyed by fire, and that especially said records so far as they relate to the title of your cross-petitioner's said land, and especially the record of the patent from the Government of the United States to said John Holbrook, and also the record of all other conveyances in your cross-petitioner's deraignment of title as hereinabove set forth, recorded prior to said 9th day of October, 1871, and that the originals of all of said conveyances have been lost or destroyed and are not in the power of your cross-petitioner to produce on the trial of said cause, and your cross-petitioner further states that by the destruction of said records the title of your cross-petitioner as aforesaid is rendered insecure and unsafe.

* * * * *

Your cross-petitioner further shows unto your Honors that the names of all persons, aside from your cross-petitioner, owning or claiming any interest in fee in said lands or any part thereof are as follows:

Conrad N. Jordan, Henry M. Alexander, Ashbell Green, Henry Day, J Ensign Fuller, John I. Bennett, Frank I. Bennett, Fred F. Bennett, James W. Converse, the Illinois Land and Loan Company, William K. Reed, Charles E. Rand, William C. Comstock, Edward B. Holmes, The South Chicago and Southern Railroad Company, The Cook County Canal and Dock Company, United States of America, Franklin A. Cleveland, Elli A. Beach, The Norwood Park Building Loan and Homestead Association, George W. Woodbury, Herman Felsenthall, Marcus A. Thompson, Alfred

Petterson, Chester B. Rushmore, Charles B. Shedd, Andrew Crawford, Willard N. Wheeler, Jacob Keller, Frank E. Hoffman, John Hogan, Catherine Ryan, Austin S. Field, William Harrison, John B. Warren, Harvy Truesdell, Sarah S. McCohn, Isaac O. Adams, Mary E. McEwing, Elizabeth P. Thomas, the unknown heirs and devisees of Charles D. Gilmore, Samuel Davis, John C. Curtis, James M. Smith, Dorcas Matlock.

Your cross-petitioner further shows unto your Honors that the persons who are in possession of said lands or any part thereof are as follows:

Justus William Rosenquest, who is in a possession of a portion of the South East quarter of Section nineteen (19), Killam Smith, who is in possession of a portion of the North East quarter of Section thirty (30), Franklin A. Cleveland, who is in possession of a portion of the East half of the South East quarter of said Section thirty (30), Marcus A. Thompson, and Alfred Petterson, also in possession of portions of the East half of the South East quarter of said Section thirty (30), William Bush, in possession of portion of Section twenty-nine (29), Jabez G. Smale in possession of portions the South West quarter of Section twenty (20) the South Chicago and Southern Railroad Company in possession of portions of the following: The South East quarter of Section nineteen (19), the North East quarter of Section thirty (30), the East half of the South East quarter of Section thirty (30), the South West quarter of Section twenty (20), and Section twenty-nine (29) aforesaid, and that Andrew Crawford claims to be in possession of a part of said Section twenty nine (29) and that August Neubieser is in possession of some part of Sections 29 or 30 as a tenant; and that such persons are the only persons, as your cross-petitioner is informed and believes, in possession of any of such premises.

Your cross-petitioner further shows unto your Honors that the names of the person to whom any of the above described lands, submerged and unsubmerged, have been conveyed, and the deed or deeds of such conveyance recorded in the office of the Recorder of deeds for the County of Cook and State of Illinois, since the time of the destruction of the records as aforesaid and prior to the time of the filing of this cross-petition, and their residences so far as the same are known to your cross-petitioner are as follows: Andrew Farrand, residence unknown; Joseph P. Ord, residence unknown; Henry M. Alexander, residence New York City; Henry Day, residence New York City; Ashbell Green, residence New York City; Conrad N. Jordan, residence New York City; J. Ensign Fuller, residence New York City; Phoebe Farrand, residence unknown; The Cook County Canal & Dock Company, residence Chicago, Ill.; The South Chicago & Southern Railroad Co., residence Chicago, Ill.; F. D. Winslow, residence Aurora, Illinois; Henry F. Eames & Jesse Spaulding, Chicago, Illinois; Henry S. Monroe, residence Chicago, Illinois; Joseph Hartwell, residence unknown; Willard N.

Wheeler, residence unknown; Jacob Keller, residence unknown; Frank E. Hoffman, residence unknown; Mary Devan, residence unknown; John Hogan, residence unknown; Catherine Ryan, residence unknown; E. M. Hartman, residence unknown; Henry Titus, residence unknown; Austin S. Field, residence unknown; William Harrison, residence unknown: John B. Warren, residence unknown; Harvy Truesdell, residence unknown; Julius Frankel, residence unknown; Mary E. McEwing, residence unknown; Sarah S. McCohn, residence unknown; D. G. Hamilton, residence Chicago, Illinois; P. D. Hamilton, residence Chicago, Illinois; Chester B. Rushmore, residence unknown; Edward B. Holmes, Chicago, Illinois; John I. Bennett, Chicago, Illinois; Frank I. Bennett, residence Chicago, Illinois; Fred F. Bennett, residence Chicago, Illinois; James W. Converse, residence unknown; South Park Commissioners, residence Chicago, Illinois; J. Ramsey Flood, residence Hyde Park, Illinois; William C. Comstock, residence Chicago, Illinois; Charles E. Rand, Chicago, Illinois; Franklin A. Cleveland, residence Norwood Park, Illinois; Elli A. Beach, residence Chicago, Illinois; Norwood Park Building Loan & Homestead Association, Norwood Park, Illinois; George W. Woodbury, residence Chicago, Illinois; Herman Felsenthal, residence Chicago, Illinois; Marcus A. Thompson, residence Chicago, Illinois; Alfred Petterson, residence Hegewisch, Illinois; Solomon Field, residence Rockford Township, Sedgwick Co., Kan.; John C. Curtis, residence unknown; James M. Smith, residence unknown; Samuel Davis, residence unknown; Andrew Crawford, Chicago, Illinois; Dorcas Matlock, residence unknown; Thomas Wilkerson, residence unknown; Elizabeth P. Thomas, Washington, D. C.; Isaac O. Adams, residence unknown; James White, residence unknown; Alice A. Condit, residence Muncie, Indiana; Treat Campbell, Chicago, Illinois; The unknown heirs of Charles D. Gilmore, deceased, residence unknown; Charles B. Shedd, residence Chicago, Illinois; Illinois Land & Loan Co., residence Chicago, Illinois; William L. Huse, St. Louis, Mo.

Your cross-petitioner further shows unto your Honors that for the sake of certainty and brevity, and in order to avoid incumbering the record with unnecessary repetition, she hereby adopts all of that part of her answer filed herein to the original petition of said Charles B. Shedd in the case of Shedd vs. Ensign Fuller, et al., otherwise known as 443 Burnt Record, commencing with the word "this" at the beginning of the 11th line upon page 6 of said answer and ending with the word "navigation" at the end of the 14th line upon page 21 of said answer, and each and every allegation thereof, and your cross-petitioner prays that the same may be taken and considered as much a part of this cross-petition as though the same were herein repeated in *hæc verba*, and your cross-petitioner further states that the said allegations are true.

* * * * *

Your cross-petitioner further shows unto your Honors that on,

to-wit· the 27th day of October, 1882, she brought five ejectment suits in the Superior Court of Cook County against parties claiming to be in possession of portions of said lake bed lying within the shore line as shown on the plat of the original survey of 1835 aforesaid, including that part of the bed of said lake embraced within the congressional lines of the South West quarter of said Section twenty (20) and of said Section twenty-nine (29), if said lines were extended into said lake; that said causes were removed upon motion of the defendants to the United States Circuit Court for the Northern District of Illinois upon the 18th day of November, 1882, and were afterward consolidated in said court, and a trial had before the Honorable Walter Q. Gresham, Judge of said Court, and that a judgment was entered in said causes upon the 18th day of January, 1886, resulting in certain findings and judgments in favor of your cross-petitioner, which findings and judgments now remain of record in said court, and which will more fully appear by reference thereto, and which your cross-petitioner is ready to produce upon the hearing of this cause; that by the judgments aforesaid your cross-petitioner's right is established to have the waters of said lake as her easterly boundary of said lands, in sections nineteen (19) and thirty (30) aforesaid, at low water mark, and to follow said water in their subsidence, it being in said cause especially found that, owing to the operation of certain causes such as are hereinabove set forth, the water in said lake is variable, but no water line was fixed by said court and such line remains undetermined; but your cross-petitioner shows that owing to the rise and fall of the waters of Lake Michigan, as hereinbefore set forth, that portion of the bed of said lake lying West of the North and South center lines of Sections twenty and thirty-two respectively, if extended through said lake, is above *datum*, and that by reason thereof, when the waters of Lake Michigan reach *datum*, the low water mark of said lake will be at about the said North and South centre lines of said Sections twenty (20) and thirty-two (32) if extended as aforesaid, and that when the waters of Lake Michigan are below *datum* that said portions West of said line would be entirely uncovered by water, and that by virtue of the said decision this cross-petitioner is the owner in fee of that portion of the bed of the said lake as shown in the plat of the original survey by the United States Government in the year 1835, extending from her land aforesaid to the said low water line, being the North and South centre lines of said Sections twenty and thirty-two, if extended, and this cross-petitioner says that according to said decision she is the owner in fee of a large part of said South West quarter of said Section twenty (20) and of said Section twenty-nine (29), if the congressional lines of said original survey were extended into said lake.

This cross-petitioner further shows unto your Honors that she prayed an appeal from the said findings and judgments to the Supreme Court of the United States, where said cause is now pending; the reason of said appeal by your said cross-petitioner being that she

insists that she is not limited by said low water line, but is the owner in fee to the center of said lake.

Your cross-petitioner further shows that upon the first day of June, 1888, she brought two suits in ejectment against parties claiming to be in possession of certain portions to the bed of said lake, which suits are now pending and undetermined upon the law side of this Court, and this cross-petitioner insists that it would be inequitable and unjust, she having commenced and actively prosecuted the said several and above mentioned suits within the period of seven years after the granting of said certificate of entry, to allow the said cross petitioners Bennett and Jordan to wait until the expiration of seven years from the date of said certificate of entry and then bring their cross-petitions by which they seek to confirm in themselves title to the property belonging to this cross-petitioner as aforesaid, and this cross-petitioner insists that, as to her, said cross-petitioners are not entitled to invoke the benefit of said statute of limitations, and prays that this honorable court will enter no decree or take any action under said original petition, or said cross-petitions, or this cross-petition that will prejudice this cross-petitioner's rights as above set forth, or her standing in said several suits which are still pending and undetermined, and this cross-petitioner files this her cross-petition without prejudice to any and all of said suits, so far as the rights or title of this cross-petitioner may be affected by said statute of limitations.

Your cross-petitioner further alleges unto your Honors that the South Chicago and Southern Railroad Company are in possession of a part of said lake bed 100 feet in width running substantially in a northerly and southerly direction through and across the bed of said lake, which they use and occupy as a right of way for the said railroad, and upon which they have constructed a road bed and laid tracks; that the right of way of said railroad and its said tracks run across that portion of the bed of said lake sometimes called Hyke Lake, the bed of the said lake being in that part at a higher elevation than upon each side thereof, the facts with reference to the physical features of said portion of the bed of said lake having been more fully and accurately hereinbefore set forth.

Your cross-petitioner further states that the said South Chicago and Southern Railroad Company claim to own said portion of the lake bed in fee having derived such pretended title from and through conveyances, made either by the original holders of said fraudulent patents or by those claiming thereunder, and your cross-petitioner alleges that said Railroad Company has no other or better right or title to said portion of the bed of said lake than the other defendants herein, their grantors, who claim under said fraudulent survey and patents, and your cross-petitioner alleges that said Railroad Company has no title whatever to said portion of said lake bed, but is a trespasser upon the lands of your cross-petitioner owned by her as hereinbefore set forth.

Your cross-petitioner further alleges that the said South Chi-

cago and Southern Railroad Company have thrown up an embankment for its road bed which divides the said lake as shown in said original survey and plat into two portions, save that at some point in said lake bed they have left a narrow channel through which the water flows, but your cross-petitioner alleges that said channel is only about 30 feet in width: Your cross-petitioner shows unto your Honors that the effect of said embankment is to destroy or greatly impede the free passage of waters through and across the said lake from its easterly to its westerly boundary, as it was in a state of nature; that said embankment operates greatly to change the physical features of said lake and of the surrounding lands; that by reason of said embankment the westerly portion of said lake, sometimes known as Hyde Lake, is not so easily affected by a rise in the waters of Lake Michigan, which frequently occurs by reason of a strong North Easterly wind as hereinbefore set forth; and also that the waters from that part of said lake, sometimes known as Hyde Lake, when increased in depth by heavy rains and other causes hereinabove set forth, cannot so easily pass off into Lake Michigan or into the easterly portion of said Wolf Lake as they could in a state of nature and before the construction of said Railroad bed. * * *

[Amendment to said cross-petition was filed August 13, 1891, and is here inserted as per direction in the amendment, the same ending with jurat dated Aug. 5, 1891.]

And this petitioner further says that prior to the survey by the United States first herein above mentioned, the proprietary right to the lands in question and to the lake bed, and as to the lake itself, was in the United States; that after such survey had been made the lands in said Township 37 North, Range 15 East, were regularly brought into market in pursuance of the acts of Congress in such case made and provided; that those of the same bordering upon the body of water represented on the plat of the survey as a lake, including the lands embraced in the patent aforesaid to said John Holbrook, were entered or purchased from the United States; that the same were sold and granted by the United States according to the plat of the survey thereof returned to the General Land Office by the Surveyor General, and without any reservation on the part of the United States in respect to the lake bed or any part of the same; that such lake bed passed to the patentees or grantees from the United States; that such patentees or grantees and their assigns thereupon became and were seized of all the proprietary right in respect to the lake and lake bed which had previously been in the United States, and as such patentees were seized of the same in fee simple; that it is under this claim that petitioner's rights arose and exist, and that the United States could not, after having so disposed of its proprietary rights, which passed under such patents, interfere in any manner with the rights of the said patentees, including the said John Holbrook. That therefore, as well as for other reasons, the attempted survey of the lake bed

in 1874 was wholly unauthorized and irregular, and the entire action of the General Land Office of the United States on that subject, and in respect to the lake bed lands, was illegitimate, and without any jurisdiction or authority.

That the original survey made by the United States and represented by said plat was not subject to be superseded, set aside or changed after the United States sold and conveyed the lands aforesaid according to the plat of said survey; that the rights of the grantees of said lands or patentees from the United States were fixed by the Common Law, and that the method of adjustment of lines extending into the lake or through or over the body of water represented on said plat as a lake, was and is governed by said law, and by rules which are thereby established, giving effect especially to the length of the shore lines of the tracts granted by the United States bordering on said water according to the said plat. That under and by virtue of the patent aforesaid, so issued to the said John Holbrook, petitioner claims to the center of the lake as a part of the grant made by said patent of lands represented on said plat as bordering on said lake.

That said lake at the time of said original survey of said Township, and for many years thereafter, was the receptacle for the waters falling in a considerable district of country; that some of the conditions connected with it had greatly changed prior to 1874, which was a period of low waters in that vicinity, with reference to the conditions at which last-mentioned time some suggestions have heretofore been made in the answer of this petitioner; that it was not, and is not, within the power of this petitioner to state all the conditions existing at the time of said original survey, but petitioner believes it to be true that the said survey was fair and regular, and not liable to any just exception, and not subject to be rescinded or disregarded at the time of the supposed survey in 1874, as aforesaid, nor was said last mentioned survey, as petitioner is advised and believes, predicated upon or attributable to any objection to the survey originally made as aforesaid, but said supposed survey of 1874 was based upon a false theory, that is to say, upon the theory that the meander of the lake, under the original survey, although not represented on said plat, was a boundary line, and also on another false theory and assumption, to-wit: that the United States had reserved the whole of the lake as bounded by said supposed meander line, and could convey the same irrespective of any interest which had been acquired by those who entered the lands bordering on the lake as represented upon said plat; upon which false theories, as well as from various false suggestions, some of which have been detailed in the answer of this petitioner, said survey of 1874 was ordered and attempted to be sustained by the General Land Office as aforesaid.

And by way of supplement to her cross-petition aforesaid, the petitioner further shows:

That in the ejectment suit (consolidated case), in which a trial was had before Honorable Walter Q. Gresham in the Circuit Court of the United States for the Northern District of Illinois, as stated in the cross-petition of this petitioner herein, it became necessary for the Court to determine what were the rights of this petitioner in the lake bed, and on the hearing of said cause in the Supreme Court of the United States upon the coming on of such hearing at the October Term of said Court, A. D. 1890, in the matter of the writ of error sued out by petitioner, wherein Conrad N. Jordan was defendant, the said Court determined that petitioner was in respect to certain tracts therein under consideration. to-wit: the S. E. Fractional Quarter of Section 19, and the N. E. Fractional Quarter of Section 30 aforesaid, entitled to judgment as of seizin in fee to the center of Wolf Lake; and that as to the S. E. Fractional Quarter of said Section 30, petitioner was entitled to claim to the middle of the bay or projection of said lake in front of the East part of said Fractional Quarter Section, and accordingly the said Court gave judgment that the judgment previously entered by the Circuit Court of the United States for the Northern District of Illinois in said cause should be reversed, and such proceedings were afterwards had upon the remanding of said cause from the Supreme Court of the United States to said Circuit Court; that heretofore, to wit: on the 10th day of June, A. D. 1891, said Circuit Court rendered judgment in favor of this petitioner, that this petitioner was entitled to recover possession of the premises described in the declaration in said cause, and found and adjudged that the North East Fractional Quarter of Section nineteen (19), the North East Fractional Quarter of Section thirty (30) and the East fraction of the South East Fractional Quarter of Section thirty (30), aforesaid, were bounded by or situated on a lake which was and is non-navigable, and that petitioner as owner of said several tracts had the rights of a riparian proprietor in respect to said lake, and that the seizin of petitioner as to the two first named tracts extended to the center of Wolf Lake, and as to the East part of the South East Fractional Quarter of said Section thirty such seizin extended to the middle of the bay or projection of the lake in front of the same; as by said judgment, an exemplification of which will be produced, will more fully and at large appear.

And petitioner says that said judgments in the Supreme Court of the United States and in the Circuit Court of the United States for the Northern District of Illinois, respectively, put a construction upon the patent aforesaid, as said Court might rightfully do, and held that the patent to said Holbrook gave rights to the lake bed to the center of the lake, and said judgments effectually denied and repelled any right to rely upon or set up said survey of 1874 or the proceedings in the General Land Office connected with such survey; and petitioner relies upon said final adjudication of said Ejectment Suit, and says it is true, as therein found, that said lake, as repre-

sented on the plat of the survey according to which the patent was granted to said John Holbrook, was and is a non-navigable lake.

And petitioner further says that heretofore, to wit: on the 20th day of December, A. D. 1889, there was executed to petitioner a certain deed of conveyance of that date by William H. Rand and wife and Nelson A. Steele and Margaret A. Steele in their own right, and as Executor and Executrix of the last Will and Testament of Charles R. Steele, deceased, whereby the grantors quit claimed and conveyed to petitioner all their interest in that part of the South half of Section thirty (30) aforesaid, which was or is East of a line 80 rods East of and parallel with the North and South center line of said Section thirty (30); it being the intent of said grantors in said deed to bound the premises thereby granted upon the South by a line commencing at the South East corner of said Section and extending West on the Section line to a point 80 rods East of and parallel with the said North and South center line of said Section.

(*Additional amendment, filed Nov. 20, 1891.*)

And Petitioner says on information and belief that the grantors in said deed were interested in part of the property in question as shore proprietors from the ownership of the W. Fr. of the S. E. ¼ Sec. 30, in T. 37 N., R. 15 E., and traced title from the U. S. under the original survey by conveyances as follows:

1. By entry made by William B. Egan of said tract at the Land Office in Chicago, Feb. 25, 1853, and patent from the U. S. to said Egan bearing date on or about Aug. 1, 1853.

2. A deed from said Egan and wife to James Bell, bearing date Mar. 2, 1859. Recorded Mar. 5, 1859.

3. A deed from said Bell and wife to James Evans of said tract, bearing date March 5, 1859.

3½. A deed from said Evans and wife to Edmund Burke dated June 11, 1862. Recorded same date.

4. Deed from Edmund Burke to Peter Reich, recorded on or about Mar. 22, 1865.

5. A deed from said Reich to William H. Hunt, dated Apr. 6, 1866, recorded on or about June 27, 1867.

6. A deed from said Hunt and wife to John Parsons bearing date June 12, 1874. Recorded June 13, 1874.

7. A deed from said Parsons and wife to Wm. H. Rand and Chas. R. Steele bearing date Jan. 19, 1883. Recorded Jan. 22, 1883.

8. That said Chas. R. Steele deceased, leaving a last will and testament by which his interest in said tract became vested in Nelson A. Steele and Margaret A. Steele before the making of said deed to your Petitioner. That the records of said deeds designated under the numbers 2, 3, 3½, 4, 5 & 6, were, as Petitioner is informed and believes, destroyed in the great fire of Oct. 8th & 9th, 1871.

And said petitioner further embodies herein the amendments

made to her answer to the original petition referring to said amendments, as the same were filed upon leave of Court on the 13th day of August A. D. 1891.

STATE OF ILLINOIS, } ss.
County of Cook. }

Isaac N. Hardin, being duly sworn, says on oath, that he is agent for the aforesaid Gertrude H. Hardin, and as such is familiar with the matters stated in the foregoing amendments. And he further states that the said matters are true according to the best of his knowledge and belief.

ISAAC N. HARDIN,

Subscribed and sworn to before me this 5th day of August, A. D. 1891.

J. H. HARDIN,
(SEAL.) *Notary Public.*

Your cross-petitioner therefore makes parties defendant to this her cross-petition, the said Conrad N. Jordan, Joseph P. Ord, Henry M. Alexander, Henry Day, J. Ensign Fuller, Ashbell Green, Andrew Farrand, Phoebe Farrand, The Cook County Canal and Dock Company, The South Chicago and Southern Railroad Company, F. D. Winslow, Henry F. Eames, Jesse Spaulding, Henry S. Monroe, Joseph Hartwell, Willard N. Wheeler, Jacob Keller, Frank E. Hoffman, Mary Bevan, John Hogan, Catherine Ryan, E. M. Hartman, Henry Titus, Austin S. Field, William Harrison, John B. Warren, Harvy Truesdell, Julius Frankel, Mary E. McEwing, Sarah S. McCohn, D. G. Hamilton, P. D. Hamilton, Chester B. Rushmore, Edward B. Holmes, John I. Bennett. Frank I. Bennett, Fred F. Bennett, James W. Converse, South Park Commissioners, J. Ramsey Flood, William C. Comstock, Charles E. Rand, Franklin A. Cleveland; Elli A. Beach, Norwood Park Building Loan and Homestead Association, George W. Woodbury, Herman Felsenthal, Marcus A. Thompson, Alfred Peterson, Solomon Field, John C. Curtis, James M. Smith, Samuel Davis, Andrew Crawford, Dorcas Matlock, Thomas Wilkerson, Elizabeth P. Thomas, Isaac O. Adams, James White, Alice A. Condit, Treat Campbell,, The Unknown Heirs of Charles D. Gilmore, deceased, Charles B. Shedd, Illinois Land & Loan Company, Justus William Rosenquist, Killam Smith, William Bush, Jabez G. Smale, Unknown Owners, and All whom it may concern; and your cross-petitioner prays that they may each and every respectively be required to answer this her cross-petition to the best and utmost to their respective knowledge, information, remembrance and belief to all and singular the matters aforesaid as fully and particularly as if the same were here repeated and they and every of them distinctly interrogated thereto.

Your cross-petitioner further states that on a final hearing hereof she is entitled to have affirmative relief under this her cross-peti-

tion, in pursuance of the statute in such case made and provided, establishing and confirming her title to said tracts located as aforesaid in said Sections nineteen (19) and thirty (30) respectively, and to such portions of the bed of said lake as shown in the said plat of said original survey as she is by law entitled as the owner and proprietor of lands bordering upon the waters of said lake; that the said survey of 1874 may be declared null, illegal and void and the patents issued thereunder and all conveyances made under or pursuant to the said patents, and all tax deeds covering any portion of the said lands or of the bed of said lake, and all conveyances made thereunder, may be declared null illegal and void, and set aside as clouds upon the title of your cross-petitioner as hereinabove set forth; that the said South Chicago and Southern Railroad Company, and others in possession of said premises as aforesaid, or portions thereof, may each and every of them be decreed to be trespassers upon the lands and rights of your cross-petitioner, and be compelled by this Honorable Court to surrender the same into the peaceable possession of your cross-petitioner, and that your cross-petitioner may have such other and further relief in the premises as equity may require and to your honors shall seem meet.

Your cross-petitioner prays that a summons in Chancery may issue out of this Honorable Court directed to the Sheriff of Cook County to execute, commanding him to summon the said defendants and all whom it may concern to appear before this Honorable Court on the first day of the next June Term thereof to be held in the court house in Chicago on the third Monday of June A. D. 1889, then and there full, true and perfect answer to make to all and singular the matters and things in this petition contained; and your cross-petitioner will ever pray.

GERTRUDE H. HARDIN,
By SWETT & KNIGHT,
Her Solicitors.

SWETT & KNIGHT,
Solicitors for Cross-Petitioner.

STATE OF ILLINOIS, } ss.
County of Cook. }

Isaac N. Hardin being first duly sworn, deposes and says that he is the agent of Gertrude H. Hardin, that he has read the above cross-petition and knows the contents thereof, and that the same is true except as to such matters as are therein stated to be on information and belief, and as to such matters he believes it to be true.

ISAAC N. HARDIN.

Subscribed and sworn to before me this 6th day of May, A. D. 1889.

CHAS. E. REEVE,
Notary Public.

(Endorsed) Filed May 6th, 1889. Henry Best, Clerk.

Answer of Cook County Canal and Dock Co.

Separate answer of the Cook County Canal and Dock Company, one of the defendants in the above entitled cause, to the petition of Charles B. Shedd.

This defendant saving and reserving unto itself, now and at all times hereafter all manner of benefit and advantage of exception which can or may be had or taken to the said petitioners petition, and reserving the right to treat this answer as a demurrer on the final hearing, leave of court having been obtained for that purpose, for answer thereto or to so much thereof as this defendant is advised is in any way material or necessary for it to make answer unto, answering, says that it hereby adopts the answer of Gertrude H. Hardin, filed in the above entitled cause, to the original petition and each and every of the allegations thereof, and asks that the same may be treated as a part of this answer the same as if said answer were repeated verbatum herein; and this defendant further says that said answer is true.

This defendant further answering says that on the ..... day of ..... 188..., the said Gertrude H. Hardin conveyed to this defendant the strip of land described in her said answer, the same being 400 feet in width and extending from the Calumet River Eastward to the centre of Wolf Lake, and this defendant avers that it is now the legal owner of said strip of land, and that the said strip of land runs across a part of the lands claimed by the petitioner; that this defendant has succeeded to all the rights of said Gertrude H. Hardin to the said strip of land, and is entitled to the protection of this court with reference thereto, in the same manner and for the same reason which are more fully set forth in her said answer, and which is made a part hereof.

This defendant denies all allegations in the said petition not herein and heretofore confessed or denied, and all of which matters and things this defendant is willing and ready to aver, maintain and prove as this honorable court shall direct, and prays to be hence dismissed with its reasonable costs most wrongfully sustained.

And this defendant will ever pray.

COOK COUNTY CANAL & DOCK CO.,
By I. N. HARDIN, *President.*

SWETT & KNIGHT,
Solicitors for said Defendant.

STATE OF ILLINOIS, } ss.
Cook County. }

Isaac N. Hardin, being first duly sworn, deposes and says that he is the President of the Cook County Canal and Dock Company, and has signed the above answer as said President; that he has read said answer and knows the contents thereof, and that the same is true

except as to such matters as are therein alleged to be upon information and belief, and as to such matters he believes it to be true.

ISAAC N. HARDIN.

Subscribed and sworn to before me this 18th day of April, A. D. 1889.

THOMAS D. KNIGHT,
Notary Public.

(Seal)

(Endorsed) Filed May 6th, 1889. Henry Best, Clerk.

Answer of Charles B. Shedd to the Cross-Petition of Gertrude H. Hardin.

This defendant reserving to himself now and at all times all manner of benefit and advantage of exception which may be had or taken to said Cross-Petition of Gertrude H. Hardin for answer thereto, or to so much thereof as this defendant is advised is material or necessary for him to make answer unto, answering says he disclaims any and all interest in and to the Southeast fractional quarter and the East fraction of the Southwest quarter of section nineteen; the Northeast fractional quarter and the East fraction of the Southeast fractional quarter of section thirty, Township thirty-seven North, Range 15 East of the Third Principal Meridian in Cook County, Illinois, in said Cross-Petition described, except such rights as he may have as riparian owner of the lands herein referred to as owned by him, and therefore leaves it to said Cross-Petitioner to make such proof as to her deraignment of title as she may be advised.

And further answering this defendant says that he is the owner of the Southwest fractional quarter of section twenty and fractional section twenty-nine, as set up in his original petitions herein, which allegations as to his title he adopts as a part of this answer. And this defendant denies that said Gertrude H. Hardin is the owner of any part of the said land of this defendant claimed in his original petitions, either because of her riparian rights connected with the land described in her said Cross-Petition, or because said decisions of said United States Courts, or because of low water, or for any other cause. And further answering this defendant admits the survey of said fractional Township thirty-seven by the Surveyor-General in 1834 or 1835, and the making of said maps or plats, and that the grantors of said Cross-Petitioner, and of this defendant, purchased the lands in question relying on said maps or plats. And this defendant admits that the lands granted to said John Holbrook, the grantor of said cross-petitioner, were described and represented upon a map marked navigable waters, as bordering thereon, but this defendant denies that thereby said Cross-Petitioner obtained any rights or title to the lands claimed to be owned by this defendant in other sections than those granted to said Holbrook.

And this defendant further answering says as to the level of water bordering on said lands and the causes therefor this defendant

is not informed and requires such proof thereof as said Cross-petitioner is advised.

And this defendant admits the right of said Cross-Petitioner to dredge in front of the land owned by her, but denies any such right to dredge any of the land claimed by this defendant in his original petitions. And this defendant upon information and belief admits the allegations in said Cross-Petition as to the narrow spur or promontory extending in a Southerly direction from the South-west fractional quarter of section twenty, and the one extending north from fractional section twenty-nine, and the allegations therein contained as to the reasons they were not surveyed by the United States surveyors. And this defendant denies that the decisions referred to in said Cross-Petition of the United States Court allowing said Cross-Petitioner to go to low water mark gave her any title or right to the lands claimed by this defendant.

And this defendant denies all and all manner of unlawful combination wherewith he is by the said Cross-Petition charged, without this that there is any other matter, cause or thing in said Cross-Petition contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct; and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

CHARLES B. SHEDD.

STATE OF ILLINOIS, }
County of Cook. } ss.

Charles B. Shedd, being first duly sworn, on oath says that he has read the foregoing answer signed by him and knows the contents thereof, and that the same is true in substance and in fact to the best of his knowledge, information and belief.

CHARLES B. SHEDD.

Subscribed and sworn to before me this 3d day of October, 1889.

(SEAL.) ULLMAN STRONG, *Notary Public.*

(Endorsed) Filed Oct. 4th, 1889. Henry Best, Clerk.

Replication of Gertrude H. Hardin to Answer of Charles B. Shedd.

The Replication of Gertrude H. Hardin, Cross-Petitioner to the Answer of Charles B. Shedd, defendant to the said Cross-Petition.

This repliant, saving and reserving unto herself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, says: That she will aver and prove her said cross-petition to be true, certain and sufficient

in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material, or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly prays as in and by her said cross-petition she has already prayed.

GERTRUDE H. HARDIN,
By SWETT & KNIGHT,
Her Solicitors.

SWETT & KNIGHT,
Solicitors for Cross-Petitioner.

(Endorsed) Filed Nov. 26, 1889. Henry Best, Clerk.

Withdrawal of Swett & Knight in Circuit Court of Cook County February 13, 1890.

CHARLES B. SHEDD *v.* ELIZABETH P. THOMAS *et al.*	*Petition to Confirm Title.* B. R. 442 and 443.

This day come Mess. Swett and Knight and withdraw their appearance as the Solicitors for the defendants Gertrude H. Hardin and Cook County Canal and Dock Company.

Replication of Charles B. Shedd to Answer of Gertrude H. Hardin.

In the Circuit Court of Cook County, May Term, A. D. 1890. B. R. 442 & 443. In Chancery.

The Replication of Charles B. Shedd to the answers of Elizabeth P. Thomas, Conrad N. Jordan, Frank I. Bennett, John I. Bennett, James W. Converse, Andrew Crawford, Gertrude H. Hardin, South Chicago & Southern R. R. Co. and Illinois Land and Loan Company.

This Repliant, saving and reserving to himself now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to be manifold insufficiencies of the said answer of the said defendants for replication thereunto, says, that he will aver, maintain, and prove his Bill of Complaint to be true, certain, and sufficient in the law, to be answered unto; and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by this repliant without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed, or denied, is true. All which matters and things this repliant is ready to aver, maintain, and prove, as this

Honorable Court shall direct, and humbly prays, as in and by his said Petition he has already prayed.

ULLMAN STRONG
Solicitor for Complainant.

(Endorsed) Filed May 24th, 1890. Henry Best, Clerk.

Appearance of Dent & Smith in Circuit Court of Cook County.

STATE OF ILLINOIS, *County of Cook.* } ss. Circuit Court of Cook County.

SHEDD *v.* JORDAN. SHEDD *v.* THOMAS. } Burnt Rec. 442 & 443 consolidated.

We hereby enter our appearance as counsel for Gertrude H. Hardin, cross-complainant herein.

DENT & SMITH,
Attorneys.

(Indorsed) Filed Feby. 25th, 1890. Henry Best, Clerk.

Supplemental Petition of Charles B. Shedd.

To the Honorable, The Judges of the Circuit Court of Cook County, In Chancery Sitting:

Your petitioner, Charles B. Shedd, respectfully represents and shows unto your Honors, that he, heretofore, duly exhibited his petition herein against J. Ensign Fuller, Conrad N. Jordan, Henry M. Alexander, Ashbell Green, Gertrude H. Hardin, Frank I. Bennett, William K. Reed, Treat Campbell, John I. Bennett, The South Chicago and Southern Railroad Company, The Cook County Canal and Dock Company, and Jabez G. Smale, and all others whom it might concern, asserting his title to the Fractional Southwest quarter of Fractional Section Twenty, in township thirty-seven, North of Range Fifteen, East of the Third Principal Meridian, in the County of Cook and State of Illinois, and alleging the destruction of the public records of Cook County, and especially the record of a patent to said premises to Horatio B. De Witt, through whom your petitioner claimed title to the said premises, and praying to have his title thereto confirmed and established, as will more fully appear by said petition, filed in this case, to which, for greater certainty, reference is hereby made.

That said Conrad N. Jordan has duly filed his answer to this petition, and also filed his cross bill or petition herein, and that in both said answer and said cross bill, said defendant Jordan sets up the bar of a judgment in the Circuit Court of the United States,

for the Northern District of Illinois, in favor of the defendants in an ejectment suit brought by Charles H. Mitchell against said defendant Jordan, Jabez G. Smale, Frank I. Bennett and John I. Bennett, though said defendant in his said answer and cross bill omitted the names of the defendants to said suit, except said Smale and himself; which said judgment, as was alleged, was rendered on the first day of February in the year 1886, against said Mitchell, and awarded to the defendants, as was alleged, a portion of the said fractional southwest quarter of said fractional section twenty, described as the west one-half of the southwest one quarter, and the south half of the east half of the southwest one quarter, and lot two; all in said fractional southwest quarter of said fractional section twenty.

Your petitioner alleges that by the said judgment there was awarded to the said Mitchell a tract of land containing about four and fifty three hundredths acres, being so much of said fractional quarter as would be included within the lines of meander if run according to courses and distances, given in the field notes of the original survey; and that the judgment of the court went against said Mitchell for the balance of the land in said fractional southwest quarter of said fractional section twenty. That thereafter a writ of error from the Supreme Court of the United States to the said Circuit Court of the United States for the Northern District of Illinois, to reverse the said judgment, was duly sued out and prosecuted in the name of the said Mitchell; and that upon the hearing of said writ of error in said Supreme Court of the United States, such proceedings were there had, that on the 11th day of May, 1891, the said court rendered a judgment reversing the said judgment of the Circuit Court of the United States for the Northern District of Illinois, and remanded the said cause to said Circuit Court, with directions to enter judgment therein for said plaintiff Mitchell, in conformity with the opinion of said Supreme Court, as will more fully appear from the said opinion, or a certified copy thereof, to which for greater certainty and particularity, reference is hereby made; which said judgment stands in full force and effect not vacated, set aside, or in any wise modified or impaired.

And that in said opinion of the said Supreme Court, which was filed on said 11th day of May, 1891, it was held and decided that said plaintiff Mitchell was entitled to the said fractional southwest quarter of said section twenty, and the court below was instructed to enter judgment accordingly. That thereupon a motion was made in the name of said Mitchell in said suit in said Circuit Court of the United States for the Northern District of Illinois on the said judgment and opinion of the Supreme Court, for judgment as in said opinion directed, and the said Circuit Court of the United States for the Northern District of Illinois, thereupon, on the 12th day of June in the year 1891, being fully advised in the premises, did accordingly render judgment for said plaintiff for said fractional southwest quarter of said fractional section twenty, as is in said judg-

ment particularly set forth, together with all riparian rights, privileges and benefits incident to the position and location of said land, with reference to Wolf and Hyde Lakes, as by the record of said judgment, or a certified copy thereof, to which for greater certainty reference is hereby made, will more fully appear, which said judgment stands in full force, not reversed, vacated or annulled or in any wise impaired.

And your petitioner further shows that in said case the said defendant Jordan set up a claim of title to all of said fractional southwest quarter of said section twenty, except the said tract of about four and fifty-three hundredths acres, under a survey made by the Government of the United States in 1874, and patent issued under said survey, under which he deraigned title; and that in substance and effect he claimed the same title thereto that he has set up in his answer and cross-bill herein, in respect to his claim of title, through various mesne conveyances under the patent of Alice Condit, as by the record of the said cause or a certified copy thereof, to which for greater certainty, reference is hereby made, will more fully appear. That the said Supreme Court of the United States in said case examined and adjudicated upon the respective titles of plaintiff and said defendant Jordan, and decided and adjudicated the title of Mitchell, plaintiff in that suit, to be good, and held and decided the said survey of 1874, so set up by the defendant Jordan in his answer and cross-bill herein, and all patents under it, to be null and void as to said plaintiff.

And your petitioner further alleges that after he acquired title to said fractional southwest quarter of section twenty, as in his petition herein stated, he prosecuted said writ of error, though in the name of the said Mitchell, but for his own benefit and for the protection of his own interest; and that the said defendants were well aware of this, and that, as was the fact, your petitioner was the real party in interest in the prosecution of said proceedings, and really and in substance the beneficial plaintiff in said writ of error.

And your petitioner further shows that he heretofore exhibited his petition herein against Elizabeth P. Thomas, Conrad N. Jordan, Frank I. Bennett, James W. Converse, Andrew Crawford, Charles H. Wisner, Gertrude H. Hardin, Charles D. Gilmore, South Chicago and Southern Railroad Company, William Bush, and all whom it might concern, asserting his title to fractional section twenty-nine, in township thirty-seven, north of range fifteen, east of the third principal meridian, in the County of Cook, aforesaid, alleging the destruction of the public records of said County of Cook, on or about the 9th day of October, 1871, and praying that his title to said premises might be established and confirmed, as will more fully appear from said original petition now on file in this cause. That said defendant Jordan sets up and claims title to the south one-half of the northwest one-quarter, and the north one-half of the southwest one-quarter of said section twenty-nine, by his answer and cross-bill or petition filed herein.

And your petitioner further shows that said two suits so brought by your petitioner under the Burnt Record Act, so called, have been consolidated and now proceed as one case.

And your petitioner further shows that said Jordan claims title to said south one-half of the northwest one-quarter and north half of the southwest one quarter under patents based upon the said survey made by the United States in 1874, which was in substance and effect declared and adjudicated to be void as to your petitioner, by the judgment of the Supreme Court of the United States, and the judgment of the Circuit Court of the United States for the Northern District of Illinois, in the case of Mitchell against Smale and others, hereinabove more particularly referred to.

Wherefore, your petitioner charges and insists that by the said judgment of the Supreme Court of the United States in said case, and by the judgment entered in that case in the Circuit Court of the United States for the Northern District of Illinois, by the order and direction of the said Supreme Court of the United States aforesaid, it was conclusively decided and adjudicated as between your petitioner, claiming under said Mitchell, and said defendants, including the said defendant Jordan, that your petitioner was the owner in fee simple of said Fractional Southwest quarter of said Fractional Section Twenty, and all riparian and other rights connected therewith, as in the judgment specified; and that said defendant Jordan had no title nor interest therein, nor in the soil in the water adjacent thereto; and that it was also decided and adjudicated therein, that the said survey of 1874, as set up in the answer and cross bills of said Jordan herein, was void, as to your petitioner, and inoperative to affect his rights; and your petitioner relies and insists upon these estoppels by the record, to preclude the said Jordan, and the other defendants in said suit of Charles H. Mitchell against Jabez G. Smale and others as aforesaid, from asserting any title or interest, however derived, in or to said southwest fractional quarter of fractional section twenty, and from asserting any title to the said fractional section twenty-nine, or any part thereof, based upon or referred to any patents or other instruments of title issued under the said void survey of 1874, as aforesaid.

Wherefore, your petitioner prays that a rule may be entered herein, requiring the defendants to these proceedings to answer this petition, but not under oath, answer under oath being waived; and that your petitioner may have such other or further relief or both in the premises as to your Honors shall seem meet, and to equity appertains.

CHARLES B. SHEDD.

Ullman Strong and S. S. Gregory, Solrs. and of counsel for Petitioner.

STATE OF ILLINOIS, } ss.
Cook County. }

Charles B. Shedd, of the City of Chicago, in said County, being first duly sworn, doth depose and say, that he is the petitioner named in the foregoing supplemental petition or bill; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters he believes the same to be true.

CHARLES B. SHEDD.

Subscribed and sworn to before me this 1st day of September, A. D. 1891.

ULLMAN STRONG,
[SEAL.] *Notary Public.*

(Endorsed) Filed Sept. 21st, 1891. Henry Best, Clerk.

[Appearances of counsel before Hon. Murray F. Tuley, Circuit Judge, at the hearing, beginning October 27, 1891:

Mr. Stephen S. Gregory, Mr. Ullman Strong, Mr. William Prescott and Mr. H. S. Mecartney, Solicitors for petitioner Charles B. Shedd.

Mr. William C. Goudy and Mr. John I. Bennett, Solicitors for defendant Conrad N. Jordan.

Mr. S. P. Douthart, Solicitor for defendant Franklin A. Cleveland.

Mr. Robert B. Kendall, Solicitor for defendant Charles E. Rand.

Mr. Thomas B Marston, Solicitor for defendant Elizabeth P. Thomas.

Mr. Frank J. Loesch, Solicitor for defendant The South Chicago and Southern Railway Company.

Mr. E. F Runyan, Solicitor for defendants Chester B. Rushmore and Edward B. Holmes.

Mr William R. Plum, Solicitor for defendant Illinois Land and Loan Company.

Mr. Thomas Dent, Solicitor for defendants Gertrude H. Hardin and The Cook County Canal and Dock Company.]

STATE OF ILLINOIS, } ss. In the Circuit Court of said County.
Cook County. }

CHARLES B. SHEDD } B. R. Nos. 442 and 443
vs. } Consolidated.
ELIZABETH P. THOMAS, *et al.* }

(No. 443 was Shedd v. J. Ensign Fuller, *et al.*)

Certificate of Evidence.

Be it remembered that on the hearing of the above entitled cause before the Honorable Murray F. Tuley, one of the Judges of said

Circuit Court of Cook County, sitting on the Chancery side thereof, in the October Term, A. D. 1891, of said Court, beginning on the 27th day of October, A. D. 1891, the complainant to maintain the issues on his behalf offered in evidence as follows:

Mr. Strong: I offer in evidence, if the Court please, our chain of title.

As to the Southwest Fractional quarter of Section 20 I offer: First—

Receiver's Receipt to Horatio B. De Witt.

No. 27,185. Land Office at Chicago, Illinois,
July 10, 1848.

Received from Horatio B. Dewitt, of New York County, State of New York the sum of Five Dollars and Sixty-seven cents, being in full payment for the South West fractional Quarter of Fractional Section No. Twenty, Township No. Thirty-seven North, Range No. 15 East of Third Principal Meridian, containing Four acres and Fifty three hundredths of acre, at the rate of $1 25 per acre.

$5 67/100. THOMAS DYER, *Receiver.*

Department of the Interior. General Land Office.

Washington, D. C., Dec. 10, 1889.

I, Lewis A. Groff, Commissioner of the General Land Office, Do Hereby Certify that the annexed copy of Chicago, Illinois, Cash Receipt No. 27,185, in favor of Horatio B. Dewitt is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

LOUIS A. GROFF,

[SEAL] *Commissioner of General Land Office.*

Second—

The United States Patent, dated March 1st, 1850, to Horatio B. Dewitt. There is a clause in the Patent which says "According to "the official plat of the survey of said lands."

Patent to Horatio B. De Witt.

THE UNITED STATES OF AMERICA.

To all whom these presents shall come, Greeting.

Certificate No. 27185.

Whereas, Horatio B. DeWitt, of New York County, New York, has deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Chicago, whereby it appears that full payment has been made by the said Horatio B. DeWitt, according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the

sale of Public Lands," for the southwest fractional quarter of fractional section twenty, in township thirty-seven, of range fifteen, of the District of Lands subject to sale at Chicago, Illinois, containing four acres and fifty three hundredths of an acre according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General, which said Tract has been purchased by the said Horatio B. DeWitt.

NOW KNOW YE, That the United States of America, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, have Given and Granted, and by these presents Do Give and Grant unto the said Horatio B. DeWitt and to his heirs, the said Tract above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said Horatio B. Dewitt and to his heirs and assigns forever.

In testimony whereof, I, Zachary Taylor, President of the United States have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the first day of March, in the year of our Lord one thousand eight hundred and fifty, and of the Independence of the United States the seventy-fourth.

By the President:

(Seal) Z. TAYLOR,
By THO. EWING, Jr.,
Secretary.

Recorded, Vol. 55, Page 28. N. SARGENT,
Recorder of the General Land Office.

Department of the Interior. General Land Office.
Washington, D. C., February 20th, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of Patent in favor of Horatio B. Dewitt, founded on Chicago, Illinois, Cash Entry No. 27185, is a true and literal exemplification from the record in this office.

In testimony whereof, I have hereunto subscribed my name and caused the Seal of this office to be affixed, at the City of Washington, on the day and year above written.

N. C. McFARLAND,
[SEAL] *Commissioner of General Land Office.*

(Schedule or chain of conveyances from Horatio B. DeWitt to Charles B. Shedd, purporting to convey or covering the southwest fractional quarter of said Section 20, as described in the patent therefor.)

* * * A deed from Horatio B. Dewitt and wife to Charles H. Mitchell, dated October 3rd, 1881.

A deed from Charles H. Mitchell and wife to Hugh L. Mason, dated March 2nd, 1883, conveying a one-fourth interest.

A deed from Charles H. Mitchell and wife to Lizzie Prescott, dated March 2nd, 1883, conveying a one half interest.

A deed from Charles H. Mitchell to Nellie J. Mitchell, dated September 12th, 1883, conveying all interest in the Fractional Southwest Quarter of Section 20.

A deed from Hugh L. Mason and wife to the petitioner, Charles B. Shedd, dated June 10th, 1886, conveying a one-fourth interest.

A deed from Nellie J. Mitchell and husband to Charles B. Shedd, dated June 9th, 1886, conveying a one-fourth interest.

A deed from Lizzie Prescott and husband to Charles B. Shedd, dated February 27th, 1888, conveying a one-half interest. * * *

As to Fractional Section Twenty-nine (29), I offer:

First—

Register's Receipt to Stephen A. Douglas.

No. 30,053. Land Office at Chicago, Illinois,
Eighth day of May, 1855.

It is hereby certified that, in pursuance of law, Stephen A. Douglas, of Cook County, State of Illinois, on this day purchased of the Register of this office the Lot or Fractional Section No. Twenty-nine in Township No. Thirty-seven of Range No. Fifteen, containing seven 37/100 acres, at the rate of two dollars and fifty cents per acre, amounting to Eighteen dollars and Forty-two cents, for which the said Stephen A. Douglas has made payment in full as required by law.

Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Stephen A. Douglas shall be entitled to receive a Patent for the lot above described.

SAMUEL ASHTON,
Register.

(4—189) No. 30052, Chicago. Recorded Vol 59, page 360 Pat. 1st Oct 1855 for aff. of lost dup. See No. 30047.

Department of the Interior. General Land Office.

Washington, D. C., June 12, 1888.

I, T. J. Anderson, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of Chicago, Illinois, Cash Certificate No. 30,053 issued May 8th, 1855, to Stephen A. Douglas, is a true and literal exemplification from the original on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

T. J. ANDERSON,

[SEAL] *Acting Commisssoner of General Land Office.*

Second—

Patent to Stephen A. Douglas.

THE UNITED STATES OF AMERICA.

To all whom these presents shall come, greeting:

Certificate No. 30053.

Whereas Stephen A. Douglas of Cook County, Illinois, has deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Chicago, whereby it appears that full payment has been made by the said Stephen A Douglas according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the Public Lands," for Fractional Section twenty-nine, in Township thirty-seven of range fifteen, in the district of lands formerly subject to sale at Chicago, now Springfield, Illinois, containing seven acres and thirty-seven hundredths of an acre according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Stephen A. Douglas.

NOW KNOW YE, That the United States of America, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Stephen A. Douglas and to his heirs, the said Tract above described; to have and to hold the same, together with all the rights, privileges, and appurtenances, of whatsoever nature, thereunto belonging unto the said Stephen A. Douglas and to his heirs and assigns forever.

In Testimony Whereof, I, Franklin Pierce, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the first day of October, in the year of our Lord one thousand eight hundred and fifty-five, and of the Independence of the United States the eightieth.

By the President:

[L. S.] FRANKLIN PIERCE,
By H. C. BALDWIN,
Ass't Secretary.

Recorded Vol. 59, Page 360.

J. N. GRANGER,
Recorder of the General Land Office.

Department of the Interior, General Land Office,
Washington, D. C. March 13, 1889.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed copy of Patent in favor of Stephen A. Douglas, founded on Chicago, Illinois, Cash Entry No. 30053 is a true and literal exemplification from the record in this office.

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In Testimony Whereof, I have hereunto subscribed my name and caused the Seal of this Office to be affixed at the City of Washington, on the day and year above written.

S. M. STOCKSLAGER,

[SEAL] *Commissioner of General Land Office.*

(Schedule or chain of conveyances from Stephen A. Douglas to Charles B. Shedd, purporting to convey or covering Fractional Section 29, as described in the patent therefor.)

A certified copy of the decree of the Probate Court, restoring the proceedings in the estate of Stephen A. Douglas, May 24, 1884.

Proceedings in case 23,384 in the Circuit Court of Cook County, commenced April 4th, 1884, being the case of Rhodes, Executor of the estate of Douglas vs. Estate of Douglas, a petition to sell real estate.

Deed from Daniel P. Rhodes, Executor of Stephen A. Douglas, to John Forsythe, dated September 26th, 1864.

A deed from John Forsythe and wife to Catherine M. Gordon, dated May 29th, 1876.

A deed from Catherine M. Gordon, widow, to Lizzie Prescott, dated October 23rd, 1886.

A deed from Lizzie Prescott and husband to Charles B. Shedd, dated December 18th, 1886, conveying a one-half interest.

A deed from Lizzie Prescott and husband to Charles B. Shedd, dated February 27th, 1888, conveying a one-half interest.

Mr. Gregory: I offer a certified copy of the original plat, This plat was certified by the Surveyor General March 18, 1836, at the St. Louis Office.

(Said plat is herein inserted, marked Shedd's Exhibit A.)

Department of the Interior, General Land Office,

March 8th, 1883.

I, N. C, McFarland, Commissioner of the General Land Office, do hereby certify that the annexed tracing of the plat of township 37 north range 15 east, 3rd principal meridian. Illinois, is a true and literal exemplification of the official plat of said township formerly of record in the United States land office at Chicago, Illinois, subsequently of record in the United States land office at Springfield, Illinois, and now of record in the General Land Office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

N. C. McFARLAND,

[SEAL] *Commissioner of General Land Office.*

I offer a certified copy of the field notes, of the original survey of Township 37 North, Range 15, East of Third Principal Meridian, relating to sections 19, 20, 29 and 30, certified by the Auditor.

Field Notes of Survey 1834–5.

Field Notes of Sections 19, 20, 30, 31 and 32, and meanders of navigable lake in said Sections in Township 37 North, Range 15, East of the Third Principal Meridian.

Commencing at the South West corner of said Section 31:

East along the South boundary of Section 31, Township 37 North, Range 15 East of the 3rd principal meridian, counting the distance from the Township corner.

Chains.

10.50 Indian trail course N. E. & leave timber & enter marsh bears N. W.

26.50 Intersect the Left Bank of the Grand Kalamick River (a navigable stream) runs N. W. where raised a mound beneath which deposited 2 quarts of charcoal & set a post for the corner to fractional sections 6, 31, Townships 36 & 37 North Range 15 East.

30.67 Intersect Right bank of the Grand Kalamick River a navigable stream where set a post for the corner to fractional sections 6, 31, Township 36 & 37 North Range 15 East from which a White Ash 17 inches diameter bears North 10¼ West 67 links, a White Ash 18 inches diameter bears North 8¼ East 73 links.

40.00 Set a post for quarter section corner from which a White Ash 12 inches diameter bears South 54° West 185 links, a White Ash 8 inches diameter bears South ½° West 172 links. Land all marsh or willow swamp, not fit for cultivation—timber on the East 10.00 chains White Ash.

Chains.

65.00 Leave timber & enter marsh bears S. E.

67.00 Leave same & enter timber.

67.50 Indian trail bears N. E.

70.71 Marsh bears S. E. & E.

76.00 Leave same bears same.

80.00 Set post for the corner to Sections 31, 32, Township 37 North Range 15 East from which a Red Oak 10 inches diameter bears North 77½ West 171 links, a Burr Oak 13 inches diameter bears North 89 East 200 links.

Land mostly marsh—upland sandy 3d rate soil on ridges extending in a North Easterly direction covered with White, Red & Burr Oak; Marsh water from 1 to 3½ feet deep—timber near the River principally white ash and willow; undergrowth willow & grape vine.

East along the South boundary of Section 32, Township 37 Chains. North, Range 15 East of the 3d principal meridian, in Ill.

1.00 Leave timber and enter marsh bears N. E.

6.00 Leave marsh and enter timber bears N. E.

20.00 Road bears North.

23.50 Marsh bears N. E.

26.00 Leave same.

40.00 Set quarter section corner post from which a White Oak 10 inches diameter bears North 30¾ West 16 links, a White Oak 14 inches diameter bears North 52½ E. 25 links.

40.83 Black Oak 22 inches diameter.

42.00 Marsh bears N. E.

49.00 Leave same on a ridge of sandy prairie.

58.00 Marsh again.

60.79 Intersect State line between Indiana & Illinois 7.47 chains North of the 155th mile post (which corner agrees with the description furnished me by W. Sibley viz: "a post in mound") where raised a mound beneath which deposited 2 quarts of charcoal & set a post for the corner to fractional sections 5 & 32 Townships 36 & 37 North of Range 15 East.

Land mostly marsh, interspersed with sandy ridges covered with White, Red, Yellow & Black Oak. Soil 3d rate.

Var: 6° 40′ E.
May 20th 1834.

(Above in Book 426, pp. 72–75.)

Measuring chain compared with standard and found to agree.

North along the East boundary of Section 36 Township 37 Chains. North, Range 14 East of the 3d principal meridian in Ill.

2.68 Intersect the left and Northerly bank of the Little Kalamick River where set a post for the corner to fractional sections 31 & 36 Townships 37 & 37 North Ranges 14 & 15 East, from which a White Ash 10 inches diameter bears south 70° West 198 links—no other tree near—the place at which I establish the fractional corner above described was obtained by determining the distance North across the River from the corresponding corner on the opposite bank.

31.92 Intersect the Left and Westerly Bank of the Little Kalamick River, course N. Westerly, where raised a mound beneath which deposited 2 quarts of charcoal & set a post for the corner to fractional sections 31 & 36 Townships 37 & 37 North Ranges 14 & 15 East.

34.83 Intersect the Right & Easterly Bank of the Little Kalamick River course N. Westerly where raised a mound beneath which deposited 2 quarts of charcoal & set a post for the corner to Fractional sections 31 & 36 Townships 37 & 37 North Ranges 14 & 15 East.

40.00 Raised a mound in which set a post for quarter section corner.

Land all marsh; grass so high it is impossible for me to see my flag more than 3.00 chains when the flag is elevated 14 feet from the ground.

80.00 Raised a mound beneath which deposited 2 quarts of charcoal & set a post for the corner to sections 25 & 36 Township 37 North Range 14 East of the 3d principal meridian. Land all marsh—water in places 4 inches deep.

North along the East boundary of Section 25 Township 37 North Range 14 East of the 3d principal meridian.

Chains.

40.00 Raised a mound in which set a post for quarter section corner. Land all marsh or wet prairie too wet for cultivation.

52.28 Intersect the Right Bank of the Little Kalamick River—course N. Easterly where raised a mound for corner to fractional section 25 & 30, Townships 37 & 37 North Ranges 14 & 15 East, beneath which deposited 2 quarts of charcoal & set a post.

56.61 Intersected the Left Bank of the Little Kalamick River set a post for the corner to fractional sections 30 & 25 Townships 37 & 37 North of Ranges 14 & 15 East from from which a willow 9 inches diameter bears south 11½ West 56 links—no other tree near.

66.00 Willow Thicket bears East and West.

71.00 Leave same.

80.00 Set post for the corner to sections 24 & 25 Township 37 North Range 14 East, from which a willow 7 inches diameter bears North 21½ West 115 links distant, a willow 9 inches diameter bears South 63½ East 211 links. Land all marshy banks along the river.

North along the East boundary of Section 24 Township 37 North Range 14 East of the 3d principal meridian in Ill.

Chains.

2.00 Willow thicket (circular).

6.00 Leave same.

40.00 Raised a mound in which set quarter section corner post. Land all marsh—water in places 2 feet deep.

75.00 Ridge of Oak timber course N. E.

77.00 Leave same.

80.00 Set post for the corner to Sections 13 & 24.
Township 37 North Range 14 East from which a yellow oak 10 inches diameter bears South 3¾ East 471 links, a Burr Oak 18 inches diameter bears South 5¼° West 490 links.
Land all marsh except ridge, timber on ridge White. Yellow & Burr Oak, very scattering 3d rate soil. * * *
(Above in Book 426 pp 82–86.)

North between Sections 31, 32 Township 37 North Range 15
Chains. East of the 3d principal meridian in Ill.
1.00 Enter marsh & leave prairie bears N. E.
7.00 Leave marsh bears same & enter timber.
20.00 Road bears N. W.
21.50 Leave timber & enter marsh bears N. W.
40.00 Set post for quarter section corner from which a yellow oak 15 inches diameter bears N. 38½° E. 537 links,—no other tree near.
Land south of marsh sandy ridges covered with very poor yellow oak timber—soil 3d rate.
67.00 Leave marsh and enter timber bears S. W. & S. E.
80.00 Set a post corner to sections 29, 30, 31, 32 Township 37 North Range 15 East from which a Burr oak 24 inches diameter Bears N. 10° E 41 links a Burr oak 20 inches diameter bears South 66¼ E. 98 links a Red oak 14 inches diameter bears South 20½° W. 82 links, no tree near in Section 30.
Land to timber all marsh—timber Burr, White, & Red oak. 3d rate soil timber very thin and poor.

West between Sections 30, 31, Township 15 North Range 15
Chains. East of the 3d principal meridian in Ill.
2.84 Intersect South Easterly margin of a navagable lake where set a post for the corner to fractional sections 30, 31 Township 37 North Range 15 East from which a Burr oak 18 inches diameter bears N. 81¼° E. 286 links, a Burr oak 10 inches diameter bears S. 30¾° E 177 links. Sent my flagman around southern extremity of Lake & caused the flag to be set on the opposite side thereof on the line between Sections 30, 31. I then offset S. 5.00 chains to a point from which the flag set as aforesaid bears N. 79° 48′ W. making the distance across the lake 27.78 chains therefore at (2.84 more 27.78) equal to—
30.62 Set a post on the Southwest Bank of Lake for the corner to fractional Sections 30,31 Township 37 North Range 15 East, from which a Burr oak 13 inches diameter bears N. 64¾ W. 149 links, a black oak 18 inches diameter bears S. 80° W. 138 links.
31.50 Leave marsh on lake & enter timber bears N. E.
39.75 Leaves timber & enters marsh bears N. E. & S. W.

40.00 Set quarter section corner post from which a Burr oak 24 inches diameter bears N. 29¾° E. 209 links. A red oak 14 inches diameter bears N. 1½° W. 466 links—Land 3d rate soil thinly timbered with yellow and Burr oak & Red oak.

80.40 Intersect East Boundary of Township 37 North Range 14 East 25 links North of the corner to Sections 25,36 where raised a mound beneath which deposited 2 quarts of charcoal & set a post for the corner to Sections 30,31 Township 36 37 North Range 15 East.

Land all marsh, water from 4 to 12 inches deep.

East between Sections 29,32 Township 37 North Range 15 East of the 3d principal meridian.

5.97 Intersect the S. W. side of a navigable Lake where set a post corner to fractional sections 29,32 Township 37 North Range 15 East from which a Burr oak 22 inches diameter bears N. 54 W. 76 links. A Burr oak 24 inches diameter bears S. 18 W. 178 links—Land 3d rate soil thinly timbered with Burr, White & Yellow oak.

North between Sections 29, 30 Township 37 North Range 15 East
Chains. of the 3d Principal meridian in Ill.

14.50 Intersect Bank of Lake where set a post corner to fractional Sections 29,30 Township 37 North Range 15 East from which a Burr Oak 14 inches diameter bears N. 73 E. 186 links. A Burr Oak 24 inches diameter bears S. 78 E. 169 links.

Land 3d rate soil thinly timbered with white yellow & Burr Oak.

As the remainder of this line is in the Lake I commenced work at the corner to Sections 24,25. Township 37 North Range 14 East, and run thence

East between Sections 19,30. Township 37 North Range 15 East
Chains. of the 3d principal meridian.

20.00 Leave marsh on a sandy ridge bears North & South.

24 00 Leave same and enter marsh.

26.57 Intersect left Bank of the Little Kalamick River runs North where set a post from which a willow 14 inches diameter bears S. 20 E. 48 links a yellow oak 10 inches diameter bears N. 60 W. 339 links for the corner to fractional sections 19,30, Township 37 North Range 15 East.

28.35 Intersect Right Bank of the Little Kalamick River where set a post for the corner to Sections 19,30, Township 37 North Range 15 East from which a Burr Oak 6 inches diameter bears S. 28¾ E. 27 links a white oak 6 inches diameter bears N. 23 W. 32 links.

30.00 Leave timber & enter marsh bears North & South.

37.50 Road bears North.

40.00 Set a post from which a White Ash 10 inches diameter bears S. 2½ W. 413 links no other tree near for quarter

Section corner.—Land timber on sandy ridges very poor yellow oak.—3d rate soil remainder all marsh.

41.00 Leave marsh & enter willow thicket bears N. & S.

47.00 Leave willow thicket & enter timber bears S. W. & N. E.

50.00 Indian trail course North.

51.75 Intersect West side of Navigable Lake bears Northeasterly & Southwesterly where set a post corner to fractional sections 19,30 Township 37 North Range 15 East from which a Hackberry 17 inches diameter bears S. 18 W. 96 links, an elm 26 inches diameter bears North 4½ West 14 links. Land to timber marsh & willow swamp timber White, Red & Burr Oak, Lynn, Hackberry &c, undergrowth hazel & Briers 1st rate soil.

Commence at the corner to Sections 13,24. Township 37 North Range 14 East and run thence

East between Sections 18,19 Township 37 North Range 15 East of the 3d principal meridian in Ill.

Chains.

16.50 Enter a marsh bears North & South.

40.00 Raised a mound in which set a post for quarter section corner. Land except marsh 3d rate soil sandy ridges covered with white & yellow oak timber very poor & scrubby marsh water 4 to 36 inches deep.

42.14 Intersect Left Bank of the Little Kalamick River runs North West where raised a mound beneath which deposited 2 quarts of charcoal & set a post for the corner to fractional sections 18,19 Township 37 North Range 15 East.

44.98 Intersect Right & N. Easterly Bank of the Little Kalamick River where raised a mound beneath which deposited 2 quarts of charcoal and set a post for the corner to fractional Sections 18,19 Township 37 North Range 15 East.

59.00 Leave marsh on a narrow sandy ridge.

61.00 Leave ridge and enter marsh.

75.50 Leave marsh & enter timber bears North.

80.00 Set post for the corner to fractional Sections 17, 18, 19, 20, Township 37 North Range 15 East from which a yellow oak 17 inches diameter bears North 53¼ West 98 links an aspen 9 inches diameter bears S. 52½ W. 108 links a yellow oak 18 inches diameter bears S. 35¼ E. 150 links a yellow oak 9 inches diameter bears N. 63¾ E. 187 links.

Land mostly marsh water from 1 to 3 feet deep ridges of sand covered very thinly with yellow oak timber 3d rate soil.

South between Sections 19, 20 Township 37 North Range 15 East of the 3d principal meridian in Ill.

Chains.

7.50 Road course Northwardly.

12.00 Enter marsh bears S. W.

22.00 Intersect Northwesterly margin of lake where set a post from which a Red oak 22 inches diameter bears S. 81 W. 416 links a Red oak 36 inches diameter bears S. 81 W. 3.50 links Land the North 12.00 chains thinly timbered with yellow & Red Oak 3d rate soil timber poor marsh water from 6 to 40 inches deep.

May 24th 1834.

East between Sections 17, 20, Township 37 North Range 15 East of the 3d principal meridian.

Chains.

1.25 Road course nearly North.

4.00 Enter a Marsh bears North.

40.00 Set post for quarter section corner from which an Aspen 10 inches diameter bears N. 18¾ W. 377 links a Yellow oak 16 inches diameter bears N. 64 E. 348 links— Land all marsh except first 4.00 chains sandy ridge timbered with White, Yellow & Red Oak, Aspen &c. 3d rate soil.

43.50 Leave Marsh & enter timber bears N. & S.

57.27 Red Oak 22 inches diameter.

64.15 Intersect line between Indiana & Illinois 2.44 chains North of the 158th mile corner where set a post corner to fractional Sections 17, 20, Township 37 North Range 15 East from which a White Oak 12 inches diameter bears S. 20¼ W. 20 links a Red Oak 22 inches diameter bears N. 51¼ W. 31 links.

Land to timber all marsh water from 6 to 15 inches deep timber good white, Red & Black oak, Elm &c. 2d rate soil. * * *

(Above in Book 426 pp. 296 *et seq.*)

The meanders of the Lake. (Book 426, pp. 561 &c.)

Measuring chain compared with standard and found to be ¼ inch too long; adjusted thereto.

Commence at the corner established on the line between Indiana and Illinois re-established by Mr. Sibley, Depy. Surveyor (which corner agrees with the description furnished by Mr. Sibley, viz: "set post on south margin of Lake Aspin 6 S. 37 E. 106, no other"), and run thence along the South-West margin of lake along fractional section 32, Township 37 North, Range 15 East of the 3d principal meridian as follows, viz:

N. 45° W. 30.00 chains.
N. 50 W. 20.00 "
N. 60 W. 10.00 "
N. 55 W. 10.00 "
N. 22 W. 4.00 " To the corner to fractional sections 29, 32, Township 37 North, Range 15 East. Land 3d rate soil very thinly timbered with Yellow & Burr Oak.

Thence from said corner to fractional sections 29, 32, along the S. W. margin of Lake along fractional section 29, Township 37 North, Range 15 East of the 3d principal meridian as follows, viz:

North 10.00 chains.
N. 45° W. 3.00 "
N. 64½ W. 4.00 chains.
N. 2° W. 0.71 to the corner to fractional sections 29, 30, Township 37 North, Range 15 East. Land—soil 3d rate, very thinly timbered with Yellow & Burr Oak.

Thence from said corner to fractional sections 29, 30, along the Southerly margin of Lake, along fractional section 30, Township 37 North, Range 15 East of the 3d principal meridian as follows, viz:
S. 11° W. 10.00 chains
S. 12° W. 4.00 "
S. 8° W. 0.78 To the corner to fractional Sections 30, 31 Township 37 North Range 15 East.—Land all marsh not fit for cultivation. Thence from said corner to fractional sections 30, 31 along the Southerly margin of Lake along fractional Section 31 Township 37 North Range 15 East of the 3d principal meridian in Ill. as follows, viz:
S. 20° W. 15.00 chains
S. 54° W. 10.00 "
N. 61¼° W. 13.68 "
N. 10¼ W. 13.00 "
N. 13° W. 0.66 To the corner to fractional Sections 30, 31 Township 37 North Range 15 East.—Land all marsh.—Water from 1 foot to 2½ feet deep.

Thence from said corner to fractional Sections 30, 31 along the S. W. margin of Lake along fractional Section 30. Township 37 North Range 15 East of the 3d principal meridian as follows, viz:
N. 10° W. 20.00 chains
N. 5° W. 20.00 "
N. 5° E. 15.00 } To the outlet to Lake 40 links wide
N. 14° E. 26.15 } a rapid current.
To corner to fractional sections 19.30 Township 37 North Range 15 East.

[On margin: "The distance to the last course of the meanders on this page is 26.15 chains. J. A. Clark, D. S."]

Land 3d rate soil to outlet & very thinly timbered with yellow & Burr oak, from outlet 1st rate soil well timbered with white yellow & Burr oak, Hickory &c. undergrowth Hazel & Briers.

Thence from said corner to fractional sections 19, 30 along South Western margin of Lake along fractional Section 19 Township 37 North Range 15 East of the 3d principal meridian as follows, viz.
N. 20° E. 15.00 chains
N. 25° E. 15.00 "
N. 28¾ E. 35.10 to the corner to Sections 19.20 Township 37 North Range 15 East.

Land 1st 15.00 chains 1st rate.—Soil well timbered with White, Yellow & Burr Oak, Hickory, Lynn &c. Undergrowth Hazel & Briers.

[On margin: "The distance to the 3d course of the meanders on this page is 35.10 chains. J. A. Clark, D. S."]

Thence from said corner to fractional Sections 19, 20 along the Northern margin of Lake along fractional Section 20 Township 37 North Range 15 East of the 3d principal meridian as follows, viz:

N. 85° E. 10.00 chains
S. 70° E. 10.00 "
S. 55° E. 10.00 "
S. 20° E. 15.00 "
S. 80° E. 10.00 "
S. 60° E. 14.00 "
S. 46° E. 11.60 "
S. 41° E. 2.00 To the temporary post set by me on the line between Indiana & Illinois at the intersection of said line with the Lake. Land all marsh water from 6 inches to 3½ feet deep.

June 17th, 1834.

* * * * *

Resurvey of Part of the Lake (in Book 426 page 613).

Commenced at the corner to fractional Sections 19 & 20 Township 37 North Range 15 East—thence with the meanders of the Northerly margin of Lake along fractional Section 20 Township 37 North Range 15 East of the third principal meridian as follows, viz:

	Chains.
N. 85° E.	10.00
S. 70° E.	10.00
S. 55° E.	10.00
S. 20° E.	15.00
S. 80° E.	10.00
S. 60° E.	14.00
S. 46° E.	11.60

S. 41° E. 2.00 To the State line between Indiana and Illinois 60.25 chains South of 155th mile corner, at said intersection set post for corner to fractional Section 20 Township 37 North Range 15 East of the 3d principal meridian. I found the water here too deep to raise a mound.

March 5th, 1835.

State of Illinois, Auditor's Office,
Springfield, Nov. 20th, 1896.

I, David Gore, Auditor of Public Accounts of the State of Illinois, and by Law custodian of the original plats, field notes and surveys of the General Land Office formerly located at Chicago, do hereby certify that the above and foregoing is a full, true and correct copy of the field notes of the survey of Sections 19, 20, 29, 30, 31 and 32 in Township 37 North Range 15 East of the 3d principal meridian, and also of the meanders of a "Navigable Lake" in said sections; and also a true and correct copy of the field notes of the re-survey of part of said Navigable Lake made

March 5th, 1835; all as fully and completely as the same appears of record in my office in Book of Field Notes No. 426, pages 72–82, etc.

In testimony whereof I hereunto subscribe my hand and affix the official seal of my office, the day and year first above written.

DAVID GORE,

[SEAL.] *Auditor of Public Accounts of the State of Illinois.*

I offer a certified copy of the judgment of the Supreme Court in the case of Mitchell vs. Smale and others, 11th of May 1891, reversing the judgment of the court below and directing that court to enter judgment in conformity with its opinion, including the principal defendant Jordan in this case, that is, so far as he is a principal claimant under the survey of 1874.

(For this opinion see *Mitchell* v. *Smale*, 140 U. S., 442.)

CHARLES B. SHEDD, the Complainant, called in his own behalf, being first duly sworn, was examined in chief by Mr. Gregory and testified as follows:

Q. Mr. Shedd, you are the petitioner in this case? A. I am.

Q. I believe you are engaged in the ice business in this city? A. Yes, sir, I am.

Q. You have ice-houses located at the Northerly end of Wolf Lake? A. I have.

Q. How long have you had ice houses in that vicinity? A. I think since 1878.

Q. Since 1878? A. I think about that.

Q. For how long a time have you been familiar with Wolf Lake and Hyde Lake? A. I should say probably four or five years before that time, perhaps a little more, five or six years perhaps.

Q. About how large is Wolf Lake? A. I should say that it would probably square about two miles in length and one mile or a little over in width, but it is considerable longer than that with an extreme projection.

Q. The water in that lake varies, I suppose, somewhat, in height at different seasons? A. It does.

Q. How is Wolf Lake connected with Lake Michigan, if at all? A. At times it is connected with the outlet, Wolf River.

Q. Running Northwesterly? A. Running very nearly Northerly, a little Northeasterly.

Q. Northeasterly? A. Yes, sir.

Q. That is in the State of Indiana, I believe? A. It is.

Q. And how are Wolf and Hyde lakes connected at present? A. There is a channel which was dredged through there by the railroad people in building the railroad.

Q. There is a railroad running the length of the land intervening between Hyde Lake and Wolf Lake? A. Yes, sir.

Q. What is the outlet of Hyde Lake; what is that connected with on the west? A. There is another channel which was in part an old waterway, but it was enlarged by Mr. Burnham, I think, along about the time the railroad built there. I was down there at the time he dredged it, and I saw the dredging.

Q. That connects with what? A. That connects Hyde Lake with Calumet River.

Q. And the Calumet River flows into Lake Michigan? A. It does.

Q. Sometimes Lake Michigan flows into the Calumet, does it not? A. It does.

Q. Since the government, I believe, has improved the Calumet, I think deepened it of later years? A. Yes, sir they have; they have been at work for, I should say, three or four years, deepening the river.

Q. Since that has been done I will ask you to state, if you know, without speaking absolutely as an expert, how the usual level of water in Hyde and Wolf Lake compares with the Lake Michigan level? A. Since the outlets have been opened it approximates the level of Lake Michigan. Of course as Lake Michigan varies it takes time for water to flow in or flow out from either lake.

Q. Calling your attention to this plat that you see before you, showing water, Hyde Lake and Wolf Lake in blue, and drab, various drab colors for the land, purporting to have been prepared by Messrs. Cole, Alvord & Shields, in 1886 to 1890 (Jordan's Map C) I will ask you to state whether, in a general way, without committing yourself to the levels indicated there, that represents the condition of affairs there of land and water at Wolf Lake and Hyde Lake at some stages of water? A. It does approximately.

Q. What is the character of the upper part of the ridge down south of the name "Condit" on that map, and indicated by a lighter color, what is it and has been, so far as you know? A. The lightest colored portion I suppose is intended to represent the highest portion of the ridge, which in the most ordinary stages of water is dry.

Q. Are there trees, timber, on there? A. There are some trees.

Q. At about where that (indicating) terminates on the map is there a natural depression? A. There is.

Q. A little north of the south line of Section 20? A. Yes, sir, I should say a little north of it.

Q. Did the water ever flow through there? A. I understand it has flowed through there, and I have——

Mr. GOUDY: Q. So far as your knowledge goes? A. Yes, sir; I have driven over that with a horse and buggy when it was very wet and swampy and soggy there. I don't know that there was an actual stream flowing through at the time I went there.

Mr. GREGORY: Q. You have never actually seen the water flow

through there, although you have been across when it was wet and swampy? A. Yes, sir.

Q. Further south is there more high ground along what is called—where McDaid's point is found? A. Yes, sir, there is.

Q. And from there down towards Elm Island what is the character of the ground? A. It is covered with swamp grass—grass that grows in the water.

Q. Is it higher or lower than the ridge north of it? A. It is lower.

Q. And the point of high ground commences further south, about where, Mr. Shedd? A. Which point do you refer to?

Q. The point running up from Section 29—Southwest Quarter of Section 29—Southwest corner of Section 29? A. The Southwest corner? Please repeat the question.

Q. There is a point there—there is some high ground on the Southwest corner of Section 29, is there not? A. Yes, sir, there is.

Q. About how far north does that extend, that is, to about what point? A. It extends I should say six or eight hundred feet, or more perhaps than that—North of it.

Q. Up to near where that cut comes under the railroad tracks? A. Yes, sir, very near there.

Q. In high water, Mr. Shedd, in the course of the days when you first knew this land, how much of that ridge was—or that central slip of land—was covered by water, that is, how much was left dry and above water? A. Well, in extreme high water I think that about all of that ridge would be covered with water. I have seen water there so high that I think very little of it would show out of the water. I didn't go on it at that time, I don't think it would have been possible to get there except by boat, but in ordinary stages of high water I should say that the whitest portion as indicated on the map was probably above water.

Q. In other words then that would be down to what you might call McDaid's point—I believe it is sometimes called Smale's point. With the exception of what appears at one time to have been a depression, a little North of the south line of 20, in the ordinary stages of high water that ridge along there where the trees grow is above water, is it not? A. Yes, sir, I should say it would be.

Q. But in ordinary stages of high water the water covers the low ground between McDaid's point and the railroad bridge except that what they call that little island there? A. In high water I should say that would cover it.

Q. Now, since the opening of the Calumet,—since the opening of this channel into the Calumet, and the deepening of that river, is the water as high relatively as it was before? A. I don't think it is. Before that channel was opened—when it was filled with water from spring rains or melting snow or summer rains, the channel was so obstructed that it didn't run out readily, and the water would remain higher in Wolf Lake than it was in Lake

Michigan. We have sometimes opened the channel at the northerly end and let the water run out, and lowered it down in that way.

Q. You mean in Wolf River in Indiana? A. Yes, sir.

Q. At the present time what is the stage of water? A. It is very low at the present time.

Q. Very low indeed? A. Lower than I ever saw it before.

Q. So that there is considerable more land uncovered on each side of the railroad than there is usually, is there not? A. Yes, sir. I think Lake Michigan is lower than I ever saw it before.

Q. You think Lake Michigan is lower than you have ever known it? A. Yes, sir.

Q. Now, referring to Hyde Lake, I will ask you to state whether there is a body of permanent water there to the west of the railroad tracks at all times? A. I should say there was. I have never seen it otherwise.

Q. Never have seen it otherwise?

THE COURT: West of the railroad tracks? A. West of the railroad tracks.

Q. Referring to this delineation here not in colors, as being parts of Sections 19, 20, 29 and 30, dated September 26th, 1891 (Referring to Jordan map D), and being a plat brought in by Mr. Bennett, I will ask you to state in a general way, without I mean committing yourself to exact distances, if that delineates the condition of affairs there? A. Oh, in a general way. I should think that was a moderately fair representation.

Q. This shows rather more land than the colored plat— A. Yes, sir, it seems to me.

Q. —which you have already referred to? A. Yes, sir, it seems to me.

Q. Now the water in both of these lakes is quite shallow, I believe, Mr. Shedd? A. It is, yes, sir.

Q. Do you know how deep the water is in Wolf Lake at a low stage of water, if you have any knowledge about it? A. I don't think that you could find in any portion of that lake at present over three feet of water; possibly three and a half feet, if as much as that.

Q. Sometimes the high water gets to a greater depth? A. Sometimes I have seen it eight feet deep in places.

Q. At Hyde Lake the water is shallow, also, in most parts, is it not? A. Yes, I should say so. It is not quite so deep as Wolf Lake.

Q. Not quite as deep as Wolf Lake. The level of Lake Michigan, I believe, is affected by the action of the wind, is it not? A. Yes, sir, it is. It is affected by the rainfall.

Q. Well, I was referring more particularly to the action of the wind. That affects it in a comparatively short time very considerably, does it not? A. Yes, sir. I have seen—sometimes it seems in a few hours it falls a foot, or more, or two feet, or rises as much as that.

Q. Now I will ask you to state if the water of these lakes sympathizes immediately in those sudden changes in the level of Lake Michigan? A. No, it takes time to run through the channel to reach the level.

Q. What is the general character of the land in this strip aside from the high land toward the central part of it? A. It is what you would call marshy or swampy ground. Some of it has a good deal of black muck on it and other bottoms are sandy. When it is wet the marshy land would be very difficult to walk over without miring.

Q. Mrs. Thomas claims the South half of the Southwest quarter, and I want to ask you about the possession of that, Mr. Shedd, if you know?

THE COURT: The possession of what?

Q. The possession of the South half of the Southwest quarter claimed by Mrs. Thomas?

THE COURT: The South half of the Southwest quarter of what?

Q. Section 29. Claimed by Mrs. Thomas. A. I have a tenant in possession who has been there ever since we took possession.

Q. What is his name? A. It is August Neubeiser.

Q. Was there any one in possession when he took possession or you took possession by him? A. Not that we could see. There was no one that we—

Q. There were no buildings on there, were there? A. No building.

THE COURT: When did you take possession?

Q. Do you remember when it was, Mr. Shedd? A. I think it was about the time of the commencement of this suit. I should have to refresh my memory on that.

Q. That would be about three years ago, a little over. You think about the time this suit was commenced? A. I can look it up.

Q. Just before or just after, or don't you remember about that? A. I think before the suit was commenced.

Q. I will ask you to state whether you have any of the original deeds, copies of which we have offered in evidence here? A. Well, I have turned the deeds over to my attorneys, and I presume those have all been presented.

Q. We have offered copies. You have not the originals there of the patent? A. No; I have turned over everything that I have as far as I know.

Q. Did you know that the Court House containing records of conveyances in this county was burned in the great fire in October, 1871? A. I was down town and saw it burning at the time of the fire.

Q. So that apparently its contents were destroyed, that is, the records of the county? A. Yes.

Q. This writ of error in the name of Charles H. Mitchell vs. Smale and others, in the Supreme Court of the United States, was prosecuted by him, that is, I mean prosecuted in the name of Mr.

Mitchell, but in whose interest and for whose benefit? A. I had a deed from Mr. Mitchell and owned the fee.

Q. You prosecuted it then in your own interest? A. I did.

Q. And for the protection of your interest to assert your rights? A. Yes, sir.

Q. And bore the expenses of that? A. Yes; I have.

Q. Do you know whether it was known to the defendants in that writ of error, or Mr. Bennett, their counsel, that you were prosecuting the writ of error? A. I have always understood that they were fully aware of the fact.

Q. Have you ever had any conversation with Mr. Bennett as to the settlement or otherwise? I don't ask you to state what. A. I think I have talked with Mr. Bennett about the matter. I am sure I have.

Q. Prior to the time the case was decided by the Supreme Court? A. Yes, sir.

Q. And in which he appeared to understand that you were prosecuting that writ of error? A. He did.

(Whereupon an adjournment was taken until 10 o'clock A. M., October 28th, 1891.)

Wednesday, Oct. 28th, 1891, 10 o'clock A. M.

Direct Examination of Mr. Shedd continued by MR. GREGORY.

Q. I was about to say Mr. Shedd that referring to the colored delineation here of Cole, Alvord & Shields (Jordan's Map C) subdivision, to which reference has heretofore been made, I read from the note, "The light blue line represents the water nearly at datum; the next belt bordering that represents the uncovered land from the water line at datum to the water line at two feet above datum, and the residue represents all land at and above two feet above datum"; I will ask you to state referring to the strips of land which are perhaps a little deeper in color, a little darker, whether you remember what the character of that land is right next to the water, as dilineated on the map? A. I was on that land a few days since, and noticed particularly west of the railroad track, that a large portion of uncovered land was seen by me, that evidently had been covered with water and the water was off of it recently, but there seemed to be no grass growing on it.

Q. Was there also mud bottom there? A. I didn't get out to look at it; it looks like sand bar.

Q. Was there something of that kind on both lake sides? A. I think there is, I didn't notice it particularly.

Q. You notice on that map there is a much larger proportion of dark color on the West of the railroad than on the East? A. There is.

Q. Is it your recollection that there is a larger proportion of grass land on the portion of this stretch East of the railroad than on the West? A. Yes, sir.

Q. On this portion, this dark colored stretch adjoining the water, is or is there not considerable grass growing? A. There was considerable grass growing over there when I was over there the other day.

Q. Is hay cut on that land? A. Yes, on a portion of it, wild marsh hay was cut.

Q. Marsh hay? A. Yes, sir.

Q. I believe you stated yesterday that the mouth of Wolf River as a rule is closed into lake Michigan? A. Yes, sir; closed by the action of the winds in throwing up sand bar.

Q. What is the condition there at present? A. It is closed now except as we are temporarily pumping some water in from Lake Michigan.

Q. You are pumping water in from Lake Michigan for what purpose; to raise the water of the lake? A. Well, it raises the water a little, and it changes the water in the end, drives the weeds, etc., out.

Q. I thought I would ask just a question or two on this matter suggested by Mr. Bennett; by way of explanation you cut ice on these lakes? A. Yes, sir; we do.

Q. Particularly in Wolf Lake? A. Yes, sir.

Q. And you desire to raise the water for what purpose? A. It is a little easier to float the ice.

Q. But not with any view of invading the possession of Mr. Bennett's estate, or changing the outline at all? A. Nothing at all of that kind; the water is so much lower than ordinary this year it will be a little more convenient to have it raised.

Q. So your desire was to hold in the water pumped from Lake Michigan? A. Yes sir.

MR. GREGORY: This plat, if the counsel thinks any further identification of it is necessary, is a partial plat of townships 37 and 38 in Indiana, I will offer in evidence.

(Objected to by Mr. Goudy on the ground that it does not relate to any land in controversy in this suit.)

THE COURT: I think I will reserve the question as to the sufficiency of this; you may proceed.

Cross-Examination by MR. DENT.

Q. You stated Mr. Shedd, that this was the time of unusually low water in these lakes; referring now to the out-let at Lake Michigan, you have stated that it is closed at present as I understand you? A. Yes sir.

Q. How long have you known of it? A. Pretty nearly twenty years; a little less than that perhaps.

Q. During that time has it been open a good deal? A. It has been open several times.

Q. Is there any particular time of year when it is apt to be open; is it open more at one time than another? A. Some time before the outlet was opened into the Calumet River, we frequently got to work ourselves, and dug a channel or ditch, or scraped it

out with scrapers, so that the water would start to running when the water was higher in Wolf Lake, and then it would open out, cut a large channell, and then it would close up afterwards.

Q. In any particular part of the year more than any other? A. I think it was more likely the water to be high in the Spring after the Fall rains and the Spring rains, and the melting of the snow.

Q. You are speaking of recollection, are you? A. Yes sir, that is my recollection, that it is more likely to be high in the Spring.

Q. The way would be open—there is but little obstruction I suppose—sand obstruction? A. Yes sir, sand mostly.

Q. And the water would make its way through that, or would it overflow? A. I think they usually had to assist it, that is, by cutting away part of the barrier in order to get it through.

Q. That was done to some extent, was it; it was opened by workmen was it? A. Yes sir, by our workmen.

Q. I was speaking of how it was or anything being done, how it was the rising waters, the accumulation of water, whether it worked its way out into the lake? A. I do not remember seeing myself any time when it worked its way unassisted.

Q. Have you opened it sometimes yourself? A. Yes sir, well with our men; I have been down and seen it done.

Q. How wide, where there is no water, how wide is that bar? A. Oh, it is sometimes three hundred, four hundred or five hundred feet wide.

Q. Sometimes narrower? A. A little bit perhaps.

Q. It is called Wolf River, isn't it? A. The arm of the lake extending to the north, is called Wolf River.

Q. Is there a flow of water in that river or that arm? A. There has been a large flow at times when we have opened it.

Q. But there is no natural flow there now? A. There is a flow from the lake now that we are pumping in at present.

Q. When was the canal or ditch made to connect with the Calumet River from the West? A. I should say about four years ago perhaps; three or four years; more perhaps.

Q. Was there a channel to the West before that time to your knowledge connecting with the Calumet River? A. Yes sir there was a channel there which was partly natural, and partly enlarged, as I understood, by hunters.

Q. Where was that channel with reference to the canal or ditch that was made after the railroad was put there, north or south; wasn't it north? A. I can't say definitely in regard to that, because I never went through it in a boat; I simply have seen it in passing by, I can't locate it entirely.

Q. Before the railroad was put here, did you ever see the water cover this low land over the McDaid tract and down here over this, almost one sheet of water? A. I think I have seen that island pretty well overflowed, and the greater portion of the dark colored part overflowed.

Q. A greater proportion of this? A. Yes sir, pretty well up to the white part.

Q. Making one body of water? A. Yes sir, in high water, that is.

Q. When did you first see this map that I call your attention to now? A. I first saw it in this room I think.

Q. It purports to be a map of part of Section 19-29-30? (Jordan's Map C.) A. Yes, sir.

Q. Made by Cole, Alvord & Shields, I see? A. Yes sir.

Q. That was the map you referred to in your answer? A. Yes sir, that is the one.

Cross-Examination by Mr. Bennett.

Q. How long, Mr. Shedd, did I understand you have known the mouth of Wolf River as you call it? A. I should say that it was pretty near twenty-one years, or twenty years I should say.

Q. A little later? A. I should say it was pretty near twenty years, perhaps a little less than that since I went out that way.

Q. About 1871? A. Well, I should say that it was sometime along in that neighborhood when I first went down to Chicago meander, perhaps a little later.

Q. How long did I understand you to say, or did you say you had known the property involved in this suit between these lakes particularly? A. I don't know that I can locate the year.

Q. Well, about? A. Oh, I know I went out there on that peninsula, sometime, I should say it was early in the 70's; I think I went down with my brother.

Q. Mr. Shedd, you have referred to a map made on the date of the survey September 26th, 1891 (Jordan's Map D); you have ice houses, have you not on the Indiana state line in the vicinity of the east and west half section line of section 20? A. I don't quite understand.

Q. You have ice houses on the Indiana state line in the vicinity of what is called the DeWitt tract in this map? A. I have ice houses on the Indiana line, which is quite a distance from the DeWitt tract.

Q. As this indicates on the map southeast of the DeWitt tract on the Indiana state line about the locality of one of your ice houses? A. I think that is intended to represent one of them.

Q. How many houses have you? A. We have two others.

Q. Where is the next one north of this in respect to the east and west half section line of section 20, about how far? A. Well, I think it is about where 18th street if extended would come.

Q. Unfortunately no streets are down here, now what distance? A. Well, the section line between Indiana and Illinois don't agree, and I could not locate that exactly.

Q. How far is your next northerly ice house from your southerly ice house that you have already stated you have located on the map? A. It is something like 1000 feet I should say North of it.

Q. How far north of that is your other ice house? A. That I should say was something in the neighborhood of three-quarters of a mile from there.

Q. North of the second one? A. Yes, sir.

Q. How far north of the Southern one? A. Well, it would make it pretty near a mile I think.

Q. How far is your northerly ice house from the north of Wolf River? A. From Lake Michigan?

Q. Yes sir? A. Well, I should say it was over a quarter of a mile; I have not any measurements in my mind, it is simply a guess that I am giving you.

Q. Would the whole distance then be about a mile from the southerly ice house to the north of Wolf River? A. I should think it would be a little more than a mile.

Q. About how much? A. I cannot tell you exactly, perhaps a mile and a quarter, perhaps something of that kind.

Q. I understand you to say that the north of Wolf River so-called, is generally closed with a sand bar? A. Yes sir.

Q. Do you remember any time within twenty years of your own knowledge when the sand bar was driven out, or the mouth was opened by natural causes without assistance? A. I cannot say that I do.

Q. I understood you to say on direct examination that the water in Wolf Lake often stands higher than it stood in Lake Michigan? A. Yes, sir, it did before the channel was opened to the Calumet River.

Q. I mean if there was any connection between Hyde Lake and Wolf Lake? A. Oh, I don't know of any time when there has not been a connection between Hyde Lake and Wolf Lake when the water was high.

Q. Before the channel was artificially cut away there was water in 1886 or 1887 which has no connection with Lake Michigan? A. Oh, yes, it did.

Q. What were the causes? A. Because the channel towards the west was smaller.

Q. What were the causes of the accumulation of water? A. Oh, I suppose it was the rainfall or the melting of the snow.

Q. You speak of Wolf River; is there any river that is not part of Wolf Lake? A. Well, there is an arm.

Q. How long would you call that river? A. Pretty nearly a mile long the arm is.

Q. Arm of what? A. Well, a northern arm of the lake which is much deeper than the lake and water rushing out at times.

Q. What distance across a mile south from the mouth of the river is not open is it from the sand bar east and west, would it be a mile south? A. The width of the river?

Q. Yes sir? A. I should say that the river, the main portion of it would average something like 200 feet wide.

Q. A little south of the mouth? A. Well, there is one place

a mile south of the mouth where it comes into the lake that is narrowed down.

Q. It is wider a little further north? A. Yes sir.

Q. Now do you remember with reference to the sectional east and west line near the south end of Wolf Lake, next to the southerly end, doesn't it extend to the half section east and west line of section 32 in Illinois, or rather corresponding in Indiana if that line was extended? A. I should have to refresh my mind a little on a map in order to say; I know it extended south of these maps.

Q. The south line of section 29 is the north line of section 22 as shown on the map from the survey of September 26th, 1891; now the question is does not Wolf Lake extend all the way in Indiana a half mile south of that? A. Of the south line of section 29?

Q. Yes sir? A. I should say that the arm of it did.

Q. Any more? A. Well, I don't know just how much, I should have to refresh my mind.

Q. Then what distance do you say it is from the south shore of Wolf Lake to Lake Michigan? A. Well, I can't tell just the distance.

Q. Would it be over three miles, three miles and a half? A. It is very easy to look on a map and see; I don't know just what it is.

Q. Now where is the widest place in Wolf Lake, east and west? A. I don't know just the configuration on the east side, but I should say perhaps through the center of section 29 would come pretty near the widest portion of the lake.

Q. What distance do you say it is from the south line on the east and west half section of 29 to the state line, to the Indiana shore, and the east shore of Wolf Lake? A. If I remember right, I think it is a little less than a mile.

Q. Then at that point it would approximate about two miles wide? A. Well, a little less than that I should say in the widest portion.

Q. Now don't you know, Mr. Shedd, that the bed of Wolf Lake with very few exceptions is very nearly level? A. No, I don't think it is; I know that none of the lake is very deep, but I know low water shows a good many places dry, where there is considerable water left at low water.

Q. What is the bottom, sand isn't it? A. Yes, in places sand, some places it seems to be soft.

Q. Where is it soft? A. I have been out on the lake in a boat and found a place where a pole would go down.

Q. Generally it is sand? A. Generally it is sandy, the bottom.

Q. Now with the exception do you know of a deep channel, or a deeper channel the rest of the way meandering from the bed of the lake nearly all the way, something like a river bed? A. Well, I think there is a portion of it that is deeper than the other.

Q. It is pretty narrow, isn't it? A. Not very wide.

Q. Some thirty-five feet? A. I guess it is wider than that.

Q. Now with the exception of that depression, isn't the bed of Wolf Lake pretty level? A. I should not call it very level, because there are variations of several feet in different portions of it.

Q. They are not abrupt, are they? A. No, just north of me.

Q. Anywhere that you know of? A. No, I don't think they are abrupt.

Q. You have gone all over the lake, haven't you, so you have a chance to know what the bed is? A. Yes sir, I have been over it in a boat.

Q. I understood you to have been on the properties up west of the railroad, and along the premises west of Wolf and Hyde Lake recently? A. No, I did not go on the property itself.

Q. I mean the railroad marked "South Chicago & Southern Railroad" on the map, on both maps? A. Yes, sir.

Q. You looked at it from the railroad? A. Yes sir.

Q. You think that map is about as it is now? A. Oh, approximately; I should say it gave a fair idea of it; I have not made any measurements.

Q. You spoke of the uncovered land west of the railroad, next to what is shown as Hyde Lake; now isn't there very little soil on it? A. It seemed to be mostly sand bar.

Q. Why do you say sand bar? A. Well, because it seemed to have been recently covered with water; sand bar is different in my mind from sandy stretch of land that had not been recently covered with water.

Q. Did you notice any abrupt changes in the level of that ground anywhere in the whole distance? A. Not very abrupt, but some portions were higher than others.

Q. Well how much about? A. Oh, I should say there were variations of several feet.

Q. How? A. I should say there were variations in the different land, perhaps some portions may have been a foot or possibly two feet higher than other portions.

Q. Show us on this map of 1886 (Jordan's Map D) in your answer in which you refer to this piece west of the railroad on the McDaid piece in one of them, is one of the higher elevations? A. There was a small portion there which I had intended to be represented by the white, where some grass seemed to be growing.

Q. Were you ever over on that tract? A. I don't think I have ever been there.

Q. Don't you know that grass grows as far as represented by the whiter color, or the next whiter color there? A. There was some considerable grass I know there; I could not say how far.

Q. Did it have any appearance of having any soil? A. I should not say it was very good soil over there, sandy.

Q. Did it have any appearance of having a soil like that east

of the railroad, did you notice? A. I think there was a small portion there that had a fair soil.

Q. Have you been over the land on the east side of the railroad recently? A. Yes, I drove down over a portion of it.

Q. How often have you been over it? A. Well, I was over it a few days ago, and I think it is sometime since I have been over it before.

Q. You had no difficulty in driving the whole distance, did you? A. No, it was very dry this time.

Q. Did you get out and examine the ground? A. Yes, sir.

Q. Is there not a good soil on the East side of the railroad up to the bridge toward Wolf Lake? A. I did not go to the extreme East side of the railroad, the most of the time I was on the West side of the road.

Q. What is the soil? A. I cannot say from personal knowledge; I saw grass growing over there.

Q. Black muck? A. I think there is considerable black muck there.

Q. How deep do you say? A. I did not jump into it.

Q. Isn't there a rich soil there from six inches to eight or ten inches? A. I should say there is a good deal of black muck and perhaps as deep as that, perhaps more.

Q. Now did you observe that it was dry the whole distance from North to South? A. I noticed it was very dry the last time I was down there.

Q. Wasn't it dry enough so that it could be all plowed and cultivated and crops grown on it? A. Well, I don't believe you could depend on getting much off of it, except grass.

MR. GREGORY: You mean east of the track.

Q. East of the railroad; yes, sir.

THE COURT: All east of the railroad, you mean between the two lakes.

MR. BENNETT: All east of the railroad except the margin along Wolf Lake.

Q. Don't you know there is hardly a foot of that ground from North to South shown on this map except the margin referred to of Wolf Lake, I refer now to the map of 1886 which is dry enough to be cultivated and crops grown on if they would grow in dry soil and rich soil? A. Well, I should say that the major portion of that low ground that you could only raise grass on it; I don't think that you could raise the tame grasses.

Q. Have you ever been a farmer? A. Well, I have raised a good many of those things; I know about them; I don't think you could raise tame grasses there without being destroyed by high water, that the water in the spring season is too high.

Q. Have you ever known fires to sweep over it? A. Oh, yes a fire would burn it; I think the marsh grass will grow there.

Q. Haven't you known fires to go the whole distance of this

map? A. I have known fires to be there, but I can't say how much they covered.

Q. Do you know at one time there was a house on the DeWitt tract? A. I believe there was a small house there.

Q. Don't you know it was burned up by one of these fires? A. I heard it was burned up, but just how it was burned up I don't know.

Q. Well it disappeared? A. Yes sir.

MR. GREGORY: You saw fire there the other day near the railroad? A. Yes sir.

MR. BENNETT: Haven't you noticed, Mr. Sheld, that tame grasses are coming in? A. I have not noticed any tame grass; I know red top will grow in pretty wet soil at times.

Q. You noticed red top? A. I did not notice any red top.

Q. Now calling your attention to the map here in 1886 again, I will ask you whether there is not large timber and since you have known the tract, have not been large trees growing over the meander line on the south of the DeWitt tract clear down to the McDaid tract on the north half of the northwest quarter of 29? A. There are some large trees growing on the higher portion.

Q. Down to within 40 rods or about that of the south line of the southwest quarter of 20, are there not very large trees occasionally? A. There are some large trees on the higher portion.

Q. How large are some of the largest of them? A. Well, I should say some of them are over a foot in diameter.

Q. Are there not trees there that are over three feet in diameter? A. I did not look at them particularly to determine whether there was anything as large as that.

Q. Did you notice any large stumps there? A. No, I didn't notice them in particular; I noticed there were large trees there.

Q. What kind of trees? A. I think the largest trees seemed to be elms.

Q. Bass wood there? A. I think perhaps there was some on the high ridge, I think they will grow there.

Q. Do you know that the houses represented here on these maps, most of that have been there for some time? A. There are some houses there.

Q. Were they there when you first knew the property twenty years ago or shortly after? A. I think they were not there when I first knew the property; I think it was all vacant.

Q. Were they there in 1874, I mean between the two lakes, were the houses down on the maps there shortly after 1874? A. Well, they were there just when I cannot say, I have seen them a number of times; when they were built I cannot say.

Q. In your best judgment how long do you think they have been there? A. Well, the Smale house has been there a number of years, but I cannot say how long, I have no way of identifying it at the time.

Q. What year did you first go down there in your ice business? A. I think it was 1878.

Q. Were they there then, these two houses between these two lakes shown on the maps? A. I rather think they were, I cannot say.

Q. When was the railroad built on that land between the two lakes? A. I have got to refresh my memory on that point; my impression is it is something like four years at the least.

Q. The building of a railroad, that is, northerly and southerly through that tract, do you think it would affect the status of that land, would that affect the status of this property alone in your judgment? A. Well, it would tend to drain a portion of it, because it would open a north and south channel. They had to go in and dredge that in order to get the railroad through.

Q. Will you tell the court how it drained the water from Hyde Lake, the north and south channel? A. That would tend to lower the water in the central portion of the land, that would bring it down to the level of Wolf or Hyde Lake.

Q. Is there not, Mr. Shedd, higher ground to the North of Hyde Lake as shown on the map made in 1891, and also on the South map? A. There is higher ground.

Q. How then could a ditch running north and south drain off the water? A. If the water in Wolf or Hyde Lake was down at a rather low stage, a ditch through the center of that portion would tend to lower the water in the center, where it might naturally stay a little higher than it would on the margin.

Q. Why do you say Wolf Lake, why do you say the water in Wolf Lake? A. Well, because if there is a heavy rain-fall, it always takes time for it to pass off.

Q. You mean in very high water, when the waters had accumulated in Wolf Lake and its connection, and Hyde Lake and its connection, do you, unusually high, higher than Lake Michigan? A. Of course if the water was high in Wolf Lake or Hyde Lake it would not make any difference.

Q. Why do you say that? A. If the water was low and the land was low, was pretty near dry, it assisted it to dry out to have a ditch in it.

Q. You say that there was originally an outlet to Hyde Lake somewhat north of the present artificial cut in the Calumet River? A. I have always understood that there was an outlet across there, and I think I have driven over the roadway and seen it, but I have never been through it in a boat.

Q. You think at times it was necessary for hunters to make it deeper to get their boats in from the Calumet River? A. I have understood so.

Q. Isn't it true that the bed of the outlet is now uncovered, and considerably higher than the waters of the lake? A. I cannot say from my own knowledge about that.

Q. Have you driven along that shore lately west of Hyde Lake? A. Not lately.

Q. Within a year or two or three years? A. No, I doubt whether I have been in there.

Q. Since the railroad was built? A. Yes, I have been along there since the railroad was built.

Q. Since the cut was made from Wolf Lake to the Calumet River, have you driven over it? A. Yes, I think since the cut was made.

Q. Did you notice any water in the old channel then? A. No, I didn't notice it particularly.

Q. And it was not there yesterday? A. I didn't notice it.

Q. Was it high water or low water? A. Well, my impression is that the water was pretty high when I drove down there.

Q. Yet you don't remember any water flowing in the old channel after the new one was cut? A. No, because my attention was not particularly called to it.

Cross-Examination by MR. DENT.

Q. You say that railroad made an embankment, was there an embankment made for the railroad, or how was it made? A. The railroad people brought a large dredge from the Calumet River, came up through the channel to the extreme left of the map which I think had been previously dredged by Mr. Burnham, and then they cut across to Hyde Lake, and then they cut from there across into Wolf Lake, and then they dredged along by the side of their right of way, cutting a deep channel, and the earth, that that threw up, they used to make the railroad bed.

Q. The bed of the railroad is some feet above the level of the ground isn't it? A. Yes sir, I should say it was four or five or six feet above the level of the water there at present.

Q. And the ditch is some feet deep? A. Yes sir, quite a deep ditch there.

Q. Isn't it probably seven or eight feet or more to the bottom of the ditch? A. I think it might be perhaps, I didn't try to wade across it.

Q. From the level or grade of the railroad? A. I should think perhaps it was.

Q. That ditch extends all along on the west side of the railroad doesn't it, across the lake, entirely across the lake? A. I should say the greater portion of the lake if not all of it.

Q. And the channel running from that ditch, over towards Hyde Lake on the map, and then from the railroad track east over to Wolf Lake as represented on that map was made at the time of the railroad being constructed? A. Yes sir, that channel was made at that time I think.

Q. There may have been something either there or in that neighborhood that the hunters used for their boats? A. They may have deepened that, but I was not there at the time they threw it up, but I saw them working in the distance.

Q. That was along that low ground wasn't it? A. Yes sir.

Q. Where that channel was made? A. Yes sir, naturally low.

Q. Do you know how deep that channel is? A. No, I never measured it; I judge by looking at it it was quite deep, several feet.

Q. That is a pretty wide ditch, isn't it? A. I should judge it was at least twenty feet wide on top most of the distance, perhaps more than that.

Q. Do you know what this land is called down here that is marked Reese (referring to Jordan's map C)? A. What do you mean by that is called?

Q. Has it a popular name? A. Well, I—

Q. Do you know whether it is known as Reese Point? A. I don't know whether I ever heard it spoken of that way; we have always spoken of it as fractional section 29.

Q. Have you also heard it called Reese Point? A. Perhaps it is spoken of by Mr. Reese's name.

Q. How is it up here, Smales? A. We speak of that as fractional section 20.

Q. Do you call that Smales Point? A. No, they speak of Smales house over there, but I don't know that they call it Smales Point, we always refer to it as fractional section 20.

Q. You speak of it that way when you are describing the land I suppose? A. Yes sir.

Q. But I want to know whether there was a popular name given to these pieces of land? A. Why, it may be understood that way, but I don't know that I ever heard it spoken of before that way except right here.

Cross-Examination by MR. DOUTHART.

Q. I would like to ask you, Mr. Shedd, if you have known of anybody living on that strip of land during the time? A. Which strip?

Q. The strip that runs between Hyde and Wolf Lake. A. Oh yes, I think that Mr. Smale is living in some house there now.

Q. Do you know Mr. Cleveland living in the Cleveland tract? A. Well, I don't know just—I don't think I ever seen Mr. Cleveland, I don't know. There is a house down to the southern end there, but just where it is located I don't know.

Q. Isn't there a tract of land fenced in with a house? A. I did not look at that the other day, so I can't give you any testimony on that.

Q. Did you ever see planted and growing there any vegetables of any kind on that strip of land? A. On the interior portion of it they occasionally raise vegetables.

Q. Corn? A. I don't believe I ever saw any corn growing there. I have seen garden vegetables.

Q. What does Mr. Smale do up here? A. Why, I think when I was down there the other day there were three or four stacks of hay and I think there was a little patch of garden vege-

tables, turnips or beets or something of that kind, that is all I noticed.

Q. Any corn? A. No, I didn't notice any.

Q. Any wheat? A. No, I didn't notice any.

Q. Any oats? A. No, I didn't notice any.

Q. At any time during these twenty years? A. I don't think I ever seen corn, wheat or oats growing there.

MR. BENNETT: Q. Did you say you remembered hunters cutting a channel for their boats there from lake to lake north of where the cut is now? A. I cannot say that from my own knowledge; I have understood a great many times that the hunters had a channel that they had increased and dug out.

Q. About what time was that? A. Oh, I suppose ever since hunters have been in the country; it is merely hearsay, not my own knowledge.

Q. Did you know anything about it along about 1867? A. No, I was not there as early as 1867.

Q. You have heard of it since? A. Yes sir.

Cross-Examination by MR. MARSTON.

Q. How familiar are you with the southern portion of this property between the two lakes, Mr. Shedd? A. Fractional section 29?

Q. Fractional section 29? A. Well, I know that fairly well.

Q. Have you been down there a good deal? A. Why, I cannot say I have been down there a good deal; I have been there a number of times, several times.

Q. You say in your direct examination, I think, that the property known as the Thomas tract was vacant and unoccupied? A. It was at that time; there is no evidence of occupation.

Q. Any fence there? A. I didn't see any fence there.

Q. Were you there? A. Yes sir.

Q. Who did you say was living on that property now? A. A man by the name of Neubeiser.

Q. What is his business? A. I think he is employed in the United States Rolling Stock Company.

Q. Does he cultivate any of that land? A. I think he raised some hay there, and has garden vegetables; I saw his house there the other day; what he raised I didn't notice.

Q. How was that house built there? A. It was built there by our employees.

Q. Wasn't it floated across at night from your ice house? A. No sir; I think the material was brought over in a boat; the water was high, and it was the easiest way to get it there by boat.

Q. All built there at once? A. Oh, yes, we built it there when we got ready.

Q. Do you know whether there are any fences north and south at the time? A. I think there were no fences there, I didn't see anything.

Re-direct Examination by MR. GREGORY.

Q. Can you now state when you took possession of this tract? A. I have refreshed my memory, and think it was in the latter part of April, 1888.

Q. What date? A. I think it was about the 21st of April.

Q. 21st of April, 1888? A. Yes, sir.

MR. MARSTON: Q. How many men did you send over that night? A. I don't know, I was not down there myself; we sent over enough men to get the house in good shape.

Q. Don't know how many men went over? A. No, sir, I don't.

MR. BENNETT: Q. I would like to ask one more question; you stated that sometimes in the spring that the water of these lakes would get higher than Lake Michigan; now, before these artificial cuts were put through between these two lakes, and from Hyde Lake to the Calumet River, along in August and early September, did you ever know it to occur that the water of these lakes would get lower than Lake Michigan? A. I think that it has been the fact that the water in these lakes was sometimes lower than lake Michigan in very dry weather, the water evaporated and could not run out; that is a fact.

Q. So that they were land-locked at these times? A. Yes, sir.

MR. DENT: Q. There is a great evaporation of the waters in this location is there not at different times? A. Yes, sir.

Q. They dry up, and lower quickly? A. Yes, sir.

Q. Is that grass that grows along on that tract, the ground that is represented in that plat. What kind of grass is that? A. It is marsh grass or slough hay.

Q. It is a kind of wild grass? A. Yes, sir, it is not very valuable for feeding purposes.

Q. It dies off? A. It mats down and makes more vegetable matter.

Q. And muck accumulates there? A. Yes, sir, if it is not burned over.

Q. There is a good deal of muck, isn't there in places where that ground is represented? A. There are places where there is a good deal of decayed vegetation, such as old grass that has accumulated.

MR. GREGORY: We desire to offer the plat which is a survey of these lakes in Indiana; it is certified under date June 28th, 1883, I think photo-lithographic copies certified, of Townships 37 and 38 North, Range 10, West, of the Second Principal Meridian in the State of Indiana.

MR. GOUDY: As I understand it that is offered for the purpose of showing at the time that survey was made the condition of the north end of Wolf Lake in reference to Lake Michigan.

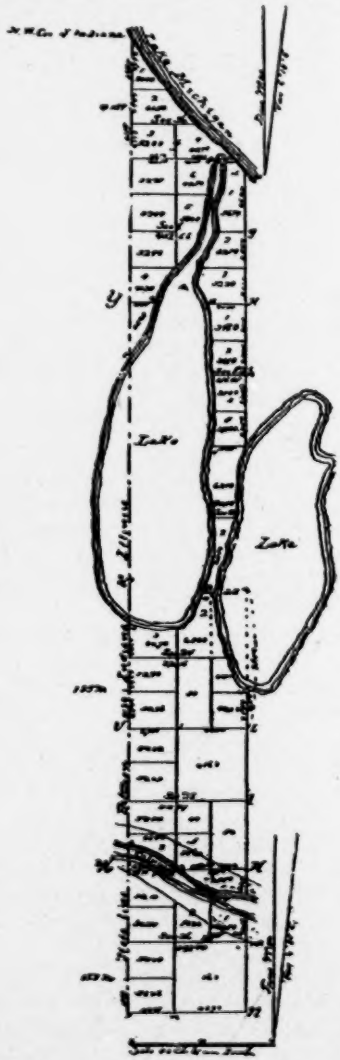
MR. GREGORY: Really, yes, sir. I would not like to have it restricted if it becomes material to show the delineation in Indiana;

while there is an extension of it into Illinois, that does not purport to represent Wolf Lake in Illinois at all, but simply that much of it as in Indiana.

(Said map is herein inserted, marked Shedd's Exhibit No. 26.)

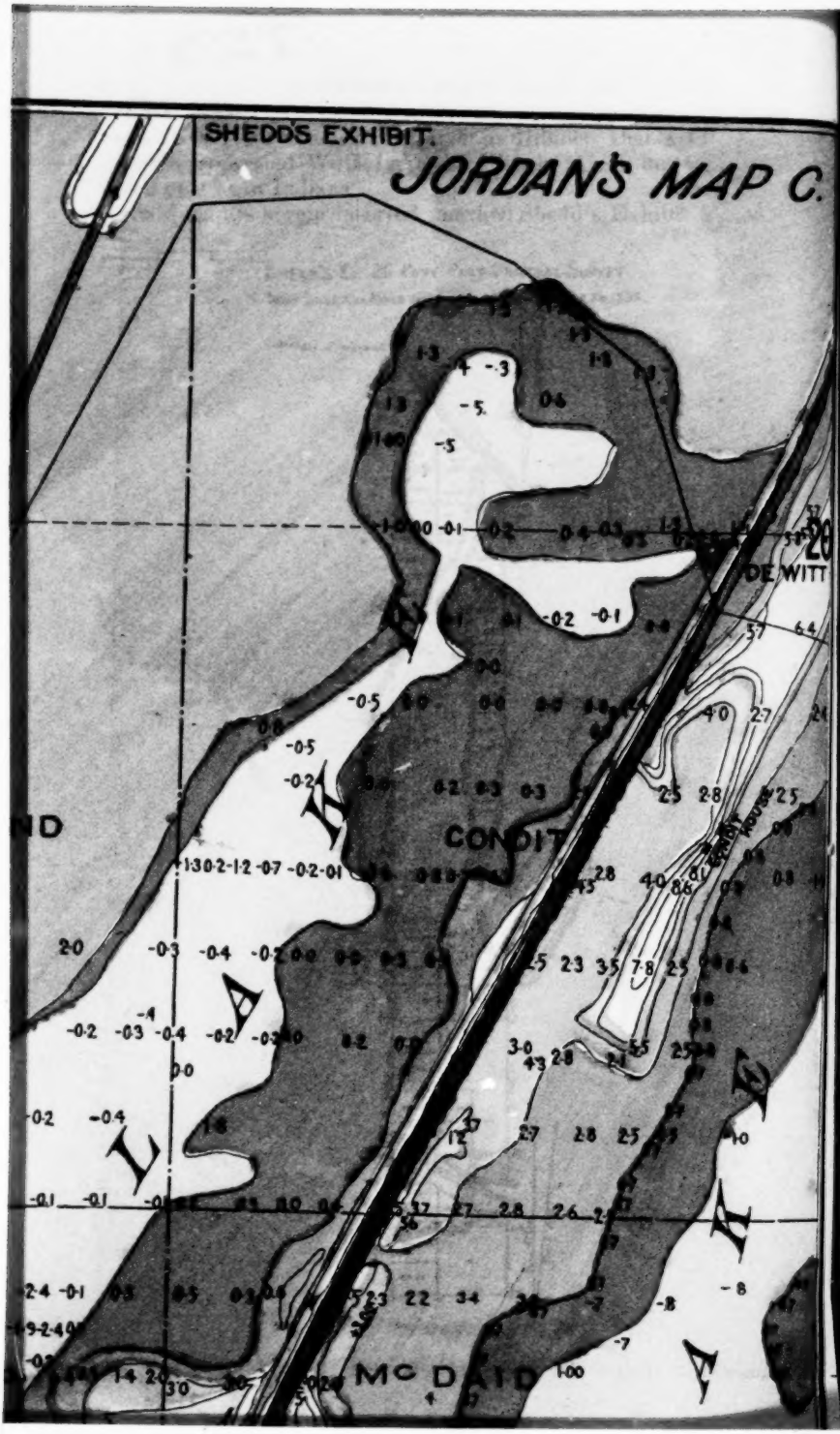
SHEDD'S EX 26 COPY PLAT ORIGINAL SURVEY

WOLF LAKE AND RIVER IN INDIANA. APPROVED APR. 26, 1836.



7238

FOLD OUT IS TOO LARGE TO BE FILMED


SHEDDS EXHIBIT.
JORDAN'S MAP C.
DE WITT
CONDIT
McDAID

MR. GREGORY: We will offer then the plat of Cole, Alvord & Shields (Jordan's Map C) in 1890 of Sections 19, 20, 29, 30, 37 and 38 East of the Third Principal Meridian.

MR. GOUDY: Is it admitted that is correct?

MR. GREGORY: No, I don't admit it is correct, but I offer it believing it to be correct. If there should be a mistake discovered, we should want to correct it.

MR. DENT: We object to it on our part.

THE COURT: I suppose if they object to it it will be necessary for you to prove the survey.

MR. DENT: I don't understand that the map has been proved to be a correct map.

THE COURT: It ought to go in to elucidate Mr. Shedd's testimony. It may go in for that purpose, because it was referred to by Mr. Shedd.

(Said map is herein inserted, marked Shedd's Exhibit, Jordan's Map C.)

MR. GREGORY: I think we will rest. If we can get a little more evidence on the question raised this morning, we may desire to do so, but in some of our testimony which will be offered in rebuttal there may be some evidence as to physical characteristics which we cannot very well separate, but with that exception we will rest.

Testimony introduced by Defendant Conrad N. Jordan, to wit.

Mr. John I. Bennett, of counsel for Jordan and others, introduced the decision of the Commissioner of the General Land Office, dated February 12th, 1878.

Decision of the Commissioner of the General Land Office in the matter of the claims of the Illinois Central Railroad Company, the State of Illinois, the County of Cook, Gertrude Hardin, Horatio B. De Witt, and sundry other persons, for lands in Township 37 North, Range 15 East, Illinois, known as the bed of Wolf Lake.

Department of the Interior, General Land Office,

Washington, D. C., February 12, 1878.

GENTLEMEN: I have considered the claims of the Illinois Central Railroad Company, the State of Illinois by herself, and by Cook County as her grantee, and sundry persons for lands lying in Sections 19, 20, 29, 30, 31, and 32, Township 37 North, Range 15 East, Third Principal Meridian, Illinois.

These lands constitute the bed of what is known as Wolf Lake, in Cook County, Illinois, shown by the survey of the township in 1835 as a navigable lake.

The plat of that survey was undoubtedly filed in the district land

office prior to June, 1836, entries of lands thereunder having been made at that time.

The waters having receded or evaporated, application for the survey of the body of land so brought into existence was made under circular issued from this office July 13, 1874. Survey was thereupon made, and approved December 31, 1874. On 9th of January, 1875, copy of the plat of this survey was sent to the district officers at Springfield, with instructions to notify all claimants for the lands of a day set for hearing testimony regarding such claims, and, after such hearing, to transmit all the proceedings, with their joint opinion thereon, to this office.

Pursuant to such instructions, hearing was held on February 8, 1875, and succeeding days, the proceedings, however, being considered as the date of February 8, and the following claims, with testimony, were presented for consideration:

The Illinois Central Railroad Company claims, as grantee of the State, the lands in controversy in sections 20, 30, and 32, under the act of Congress approved September 20, 1850, granting lands to the State of Illinois to aid in the construction of a railroad from Chicago to Mobile (9 Statutes, 466). These sections are within the six mile limits of that grant, as are also, in fact, all the lands in dispute.

The State of Illinois claims for herself the lands in sections 20, 30, and 32, under the "swamp-lands" grant of September 28, 1850 (9 Statutes, 519). This claim was not set up at the hearing, but has been asserted since. As it is of the same nature as the ensuing claim, it is considered in order that all known claims to the land may be passed upon.

The County of Cook claims, as grantee of the State, the lands in sections 19, 29, and 31, under the swamp-lands act of September 28, 1850.

Gertrude Hardin claims the land in sections 19 and 30, and parts of 20 and 29, and Horatio B. De Witt claims the southwest fractional quarter of section 20; both of these claims being based upon riparian ownership.

The claims under Sioux half-breed scrip, pre-emption and homestead laws, will be specifically mentioned hereafter.

In addition to these claims, there were attempted locations of Porterfield scrip upon various tracts. This scrip has, however, been withdrawn, and the claims canceled since the hearing.

On transmitting the claims and testimony the district officers at Springfield forwarded their joint opinion thereon, adverse to the claims of the Illinois Central Railroad Company, the county of Cook as grantee of the State, the riparian claimants, the Sioux half-breed and Porterfield scrip claimants, and in favor of certain of the preemption and homestead claimants.

The first claim for consideration is that of the Illinois Central Railroad Company, under the act of Congress approved September 20, 1850 (9 Statutes, 466).

By that act there was granted to the State of Illinois, to aid in the construction of a railroad from Chicago to Mobile, every alternate section of land, designated by even numbers, for six sections in width on each side of the said road and its branches. This grant was transferred to the company by an act of the legislature of the State.

Lands within the limits of the grant were withdrawn by telegram from this office September 19, 1850, followed by letters of September 20, 1850. Lands supposed to be not needed for the satisfaction of the grant were restored in 1852. The grant was adjusted in May, 1858, since which certain tracts, approved to the State in the adjustment, were found to have been disposed of prior to the grant, and so noted on the margin of the approved lists, as follows:

Within the six-mile limits	200 acres
Within the fifteen-mile limits	840 acres
Total	1,040 acres

showing that the railroad company has failed to this extent in receiving the quantity awarded in adjustment.

The grant has been treated by the department and the courts as fully adjusted, and I think this of itself is a sufficient bar to the claim. If, however, the company has any right to the lands, it is by virtue of the original grant of even-numbered sections within six-mile limits, and not as indemnity for lands lost by failure of title to those embraced in the adjustment.

"There be and is hereby granted," are the words of the act. The Supreme Court of the United States, in the case of the Leavenworth, Lawrence and Galveston Railroad *vs.* The United States (2 Otto, 741), say, in regard to the grant then under consideration, the language being precisely similar, that "it creates an immediate interest and does not indicate a purpose to give in future. 'There be and is hereby granted,' are words of absolute donation, and import a grant *in præsenti*. This court has held that they can have no other meaning; and the land department, on this interpretation of them, has uniformly administered every previous similar grant. *Railroad Company* vs. *Smith*, 9 *Wallace*, 95; *Schulenberg* vs. *Harriman*, 21 *idem*, 60; 1 *Lester*, 513; 8 *Opinions*, 257; 11 *idem*, 47." The act of September 20, 1850, therefore passed a present interest, and conveyed only land which then existed in the even-numbered sections within the six-mile limits. The question involved, consequently, is whether the land claimed was in existence at the date of the grant.

Meanders of what was termed a navigable lake, covering the lands in controversy, were surveyed in 1834 and 1835, and by the plat constructed from that survey this office has so far been governed in disposing of the lands in the township. The first evidence presented to this office of the existence of land within the limits of this meandered lake is found in the affidavits of Franklin A. Cleveland, George A. Rowe, Chester B. Rushmore, and Alice A. Condit,

presented by H. O. McDaid, of Chicago, as attorney, with application dated August 19, 1874, for a survey of "Wolf Lake" bed. There is, however, testimony, in connection with the claim under the "swamp-lands" grant, showing that this land was, to a great extent, covered with water so late as 1850; the tenor of all the evidence being to the effect that the greater part, if not all of it, came into existence some time subsequent to 1850 and prior to the survey in 1874 as a "lake bed" from which, by evaporation or other causes, natural or artifical, the waters had permanently receded, leaving within the unsurveyed area dry land, fit, in ordinary seasons, for agricultural purposes. On receipt of the application referred to, survey was made by direction of this office and approved as that of the bed of a lake covered with navigable water at the time of the original survey, segregated from the surveyed public lands by the meandered lines of that survey, and, consequently, excluded from the operation of laws granting or providing for the disposal of public lands while so designated a body of navigable water, and as lands which had come into existence subsequent to the original survey of the lake and adjacent lands.

Although it is possible that, at the date the railroad grant became effective, there was, between the actual borders of the lake and its borders as laid down on the survey of 1835, a small strip of land, and although the evidence goes to show that, notwithstanding the survey of 1835 treats the body of water as a whole, with no division between what are now called Wolf and Hyde lakes, there was, in 1850, a strip of timbered land running from the border of the lake, in section 20, southwestwardly, to its border in section 29, thus dividing it into two parts, the testimony as to the width of this strip in 1850 is so conflicting that it is not practicable to determine, even approximately, its area in section 20. And as the existence of sufficient portion of land or swamp to bring any subdivision within the denomination of "swamp land" in 1850 has not been established, I have preferred, inasmuch as the area of land in section 20 in 1850 would be very small, if the utmost claimed were allowed, to consider the failure to establish the swampy character of the land in 1850 as a failure to show that the plat of the survey of 1835 did not correctly represent the boundaries of the land in 1850.

It being held that the land was not in existence at the date of the grant under which the Illinois Central Railroad Company claims, it is also held, under the decision of the Supreme Court before referred to, that the grant did not attach to it on its subsequent formation or appearance, and the claim of the company is therefore rejected.

The claims of the State of Illinois for herself and the county of Cook, as grantee of the State, under the swamp lands act of September 28, 1850 (9 Statutes, 519), embrace all the lands in controversy.

These claims are rejected for two reasons: First, because of failure to establish the swampy character of the land in 1850, this

office having uniformly held that the "swamp lands" grant was a grant *in præsenti*, and that lands, to pass thereunder, must have been "swamp" at the date of the grant, not subsequently brought into that condition by the recession of waters covering the same; and, second, because so long ago as November 20, 1855, the honorable Secretary of the Interior decided that the State of Illinois was not entitled to swamp lands under the grant of September 28, 1850, in either odd or even numbered sections, within the six-mile limits of the railroad grant by the act of September 20, 1850. (1 Lester, page 523.)

The riparian claims of Gertrude Hardin and Horatio B. DeWitt have been denied by the action of this office in ordering and approving the survey of the lake bed, thus treating the land as belonging to the United States.

The claims under attempted locations of Porterfield scrip having been withdrawn, are not before this office for consideration.

The following Sioux half-breed scrip locations and attempted locations have been made upon the lands in question:

No. 380 D.—Joseph Montreul, by T. W. Tidd, attorney; filed January 3, 1874, for unsurveyed lands. Located and adjusted February —, 1875, upon lot No. 2, southeast quarter; lot No. 3, southeast quarter, section 19; lot No. 1, northeast quarter, and northeast quarter of northeast quarter, section 30.

No. 101 E.—Mary Louise Hambleton (formerly Mary Louise Bailly) and Charles Hambleton, by S. L. Campbell, attorney; filed January 3, 1874, for unsurveyed lands. Located and adjusted without date upon lot 3 northwest quarter, lot 2 and west half of southwest quarter, section 20.

No. 343 B.—Joseph Coursolle, by J. B. Culver, attorney; filed January 3, 1874, for unsurveyed lands; located and adjusted February —, 1875, upon lot No. 3 southeast quarter, section 29.

No. 323 B.—Rosean Lamoureaux (formerly Rosean Bruquier) and Odillon Lamoureaux, by Charles D. Gilmore, attorney; filed January 3, 1874, for unsurveyed lands; located and adjusted February —, 1875, upon lot No. 5 southwest quarter of section 29.

No. 96 D.—Edward Hudson, by T. B. Walker, attorney; filed January 3, 1874, for unsurveyed lands, located and adjusted February —, 1875, upon northwest quarter of section 29.

No. 185 B.—Omnies Felix, by Eugene M. Wilson, attorney; filed January 3, 1874, for unsurveyed lands; located and adjusted February —, 1875, upon southeast quarter southwest quarter, section 29. (Certificate of adjustment signed by receiver only.)

No. 80 E.—Eliza Robinson, by T. B. Walker, attorney; filed January 3, 1874, for unsurveyed lands; supposed to be for northeast quarter southeast quarter, and lots 2 and 3 southeast quarter, section 30, with lot 1, northeast quarter, section 31, but accompanied by unsigned certificate of location and adjustment.

Nos. 386 A and B.—John V. Dumerce, by Eugene M. Wilson, attorney; filed January 3, 1874, for unsurveyed lands; supposed to

be for lot 2, northeast quarter, section 32, and lot 3, northwest quarter, section 32; but accompanied by unsigned certificate of location and adjustment.

The act of Congress aproved July 17, 1854 (10 Statutes, 304), which authorizes the issue of this scrip, contains the provision that the "scrip may be located upon any of the lands within said reservation" (on the west side of Lake Pepin and the Mississippi River, in the Territory of Minnesota), "not now occupied by actual and *bona fide* settlers of the half-breeds or mixed bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to preemption or private sale, or upon any other unsurveyed lands not reserved by government, upon which they have respectively made improvements."

By reference to the instructions of February 22, 1864, from this office (2 Lester, 369), it will be observed that they prescribe that within three months after the filing of the plat of survey the scrip locator on unsurveyed lands "should repair to the district land office, file his scrip with his affidavit, designating specifically, in compact legal subdivisions, the tracts embracing his improvements, and should state in his affidavit the character and extent of his improvements, and file testimony of competent witnesses corroborative of his statement." The circular also instructs district officers that "no *mineral* or *reserved* lands can be taken by this scrip, nor can it be located upon the even-numbered double minimum reserved sections."

The law and the regulations prescribe that this scrip may be located upon lands subject to preemption or upon unsurveyed lands when accompanied by occupation and improvement of the same, but in no case upon mineral, reserved, or double minimum lands. The use of the term "even-numbered," to designate the double minimum sections, doubtless arose from the fact that in nearly all of the acts granting lands in aid of public improvements the odd numbered sections were granted and the even-numbered reserved and made double minimum; but the manifest intention was to prohibit the location of this scrip upon double minimum lands, whether in even or odd numbered sections.

Inverting these prescriptions for consideration with the scrip claims, I find that this land is within the six-mile limits of the railroad grant, under the act of September 20, 1850.

Under the third section of that act, "the sections and parts of sections of land, which by such grant shall remain to the United States, within six miles on each side of said road and its branches, shall not be sold for less than double the minimum price of the public lands when sold." The land is, consequently, double minimum land, and being such, cannot be taken under locations of Sioux half-breed scrip, because of the prohibition embodied in the regulations of February 22, 1864.

It has been claimed, however, that the *law* does not prohibit the location of this scrip upon double minimum lands. Without at-

tempting to discuss this point, I think a conclusion can be arrived at in these cases without questioning the soundness of the regulations or the settled practice of the office thereunder.

Although these pieces of scrip were filed for location on unsurveyed lands, and were each accompanied by an affidavit of one Reynolds, who sets forth his personal acquaintance with the land and that there are no improvements thereon, save those by or for the scrip locator or his attorney, there is no evidence that any improvements have ever been made by or for those persons. As these locations are all in conflict with claims under the preemption and homestead laws, this is a fatal defect, and for that reason, if for no other, they are invalid and void. Those which were adjusted are therefore held for cancelation, and the attempted locations, which were not adjusted, are rejected.

The claims under the preemption and homestead laws remain for consideration.

Lot 1 of the northeast quarter and lots 2 and 3 of the southeast quarter, section 19, in connection with lot 3 of northwest quarter, section 20, are claimed by Andrew Farrand under the preemption laws. Declaratory statement dated January 20, 1875, alleging settlement April 24, 1874.

Lot 1 of northeast quarter, section 19, with west fractional half southwest quarter, section 29, claimed by John E. Curtis. Additional homestead application dated January 14, 1875.

East fractional southeast quarter, section 19, claimed by Wright Allen. Additional homestead application dated January 14, 1875.

Lot 1, northeast quarter section 19, with lots 3 and 4, southeast quarter section 29, claimed by Samuel Davis. Additional homestead application dated January 14, 1875.

Southeast fractional quarter northeast fractional quarter section 19, with southeast fractional quarter and south fractional quarter northwest quarter section 20, claimed by James Brown, *alias* James Washington. Additional homestead application dated January 14, 1875.

West half southwest quarter, and south half of east half of southwest quarter, with lot 2 of southwest quarter, section 20, claimed by Alice A. Condit. Preemption declaratory statement dated February 1, 1875, alleging settlement August 23, 1873.

East fractional half southwest quarter, being lot 2, and southeast quarter southwest quarter, section 20, claimed by Randolph Crowley. Additional homestead application dated January 14, 1875.

West half southwest quarter section 20, claimed by Robert Price. Additional homestead application dated January 14, 1875.

Southwest quarter section 20, claimed by Orrin L. Mann. Homestead declaratory statement dated January 8, 1875.

South fractional quarter southeast quarter section 20, with northeast fractional quarter section 29, claimed by Jabez G. Smale. Homestead declaratory statement dated January 14, 1875. Home-

stead application dated July 12, 1875, covering lot 1, southeast quarter section 20, and lots 1 and 2 northeast quarter section 29.

South half northwest quarter and north half southwest quarter section 29, claimed by Solomon Field. Preemption declaratory statement dated February 1, 1875, alleging settlement June 27, 1874.

Northwest quarter section 29, claimed by Lyman D. McDaid. Homestead declaratory statement dated January 14, 1875. Homestead application same date.

North half southwest fractional quarter and north half southeast fractional quarter section 29, claimed by Syrena McDaid. Homestead declaratory statement dated January 14, 1875.

West half northwest quarter section 29, claimed by Thomas C. Wilkerson. Additional homestead application dated January 14, 1875.

East half southwest quarter section 29, claimed by James W. Smith. Additional homestead application dated January 14, 1875.

East half northwest quarter section 29, claimed by John White. Additional homestead application dated January 14, 1875.

Northeast quarter (lots 1 and 2) section 29, with north fractional northeast quarter (lot 1) section 31, claimed by Dorcas Matlock. Additional homestead application dated January 14, 1875.

Fractional southwest quarter section 29, claimed by Thomas S. Mather. Homestead declaratory statement dated January 14, 1875. Homestead application June 1, 1875.

Lot 3, southeast quarter and northeast quarter southeast quarter section 30, with lot 1, northeast quarter section 31, claimed by Franklin A. Cleveland. Preemption declaratory statement dated January 15, 1875, alleging settlement June 3, 1874. Amended April 13, 1875, to cover above-named tracts.

East half northeast quarter and lot 1 northeast quarter section 30, claimed by Chester B. Rushmore. Preemption declaratory statement dated January 20, 1875, alleging settlement April 15, 1874. Amended April 13, 1875, to cover above named tracts.

Lot 2, southeast quarter section 30, claimed by George Hawks. Homestead declaratory statement dated April 30, 1875.

Lots 2 and 3, southeast quarter and northeast quarter southeast quarter section 30, claimed by Joseph Könyvesy. Informal claim under the preemption laws, alleging settlement in January, 1868.

Southeast quarter section 30, claimed by Charles Carpenter. Homestead declaratory statement, dated January 8, 1875.

Lot 2, southeast quarter, and lot 1 northeast quarter section 30, claimed by John Medlock. Additional homestead application dated January 14, 1875.

East half northeast quarter section 30, claimed by Robert H. Cummings. Additional homestead application dated January 14, 1875.

East fractional half southeast quarter section 30, claimed by

James Washington. Additional homestead application dated January 14, 1875.

North half northeast quarter section 31, claimed by Anna E. Rees. Informal claim under the preemption laws dated April 13, 1875, and alleging settlement in 1868 or 1869.

North fraction of northwest quarter, fractional northeast quarter, and north fraction of southeast quarter section 32, claimed by Peter Munhoven. Homestead declaratory statement dated January 14, 1875. Homestead application same date.

Lots 1 and 2 of northeast quarter and lot 3 of northwest quarter section 32, claimed by William Brewer. Additional homestead application dated January 14, 1875.

North fractional half section 32, claimed by Charles E. Rees. Informal claim under the preemption laws dated April 12, 1875, and alleging settlement in 1853.

In addition to these, I find among the papers in the case various affidavits setting up the following claims: Ellis Bennett, for north half of southwest quarter of section 20, and south part of northwest quarter of section 20; Charles L. King, for southwest quarter of section 29; and John Collins, for southeast quarter of section 20. Apparently no attempt was made by these parties to properly initiate their claims, and they are now merely mentioned to show their consideration so far as they are deserving thereof.

It has been suggested that the land in question is not subject to disposal under the preemption and homestead laws, because of its being embraced within the corporate limits of the town of Hyde Park.

While it may be doubted whether an act of incorporation can confer upon a municipal government authority over land not in legal existence as such at the time of the incorporation, the discussion of such a question would be purely speculative at this time. The town has never filed any map of its corporate limits, or done any act under law looking toward setting up a claim either for the land or for its exception from the operation of the preemption laws, and I think is precluded from so doing by the act of March 3, 1877, the incorporated town covering an area many times greater than the quantity of land to which it would be entitled under the town-site laws, and the land in question being some miles from the populated portion of the town, not settled upon, inhabited, improved, or used for business or municipal purposes by the town. Such being the case, I do not think the objection carries weight, and therefore pass it by without further consideration.

Andrew Farrand's preemption claim for lot 1 of northeast quarter and lots 2 and 3 of southeast quarter section 19, with lot 3 of northwest quarter section 20, conflicts with the additional homestead applications of John E. Curtis, Wright Allen, Samuel Davis, and James Brown *alias* James Washington. The additional homestead applications were received January 14, 1875. Farrand's

declaratory statement was filed at the hearing, February 8, alleging settlement April 24, 1874.

The testimony in Farrand's behalf shows that he settled as alleged, and erected a comfortable house by June, 1874, cultivated during the year about an acre, raising melons, cabbages, &c.; fenced in the cultivated ground; erected out-buildings, which, with the house, are worth three or four hundred dollars, and cut thirty or forty tons of hay.

No evidence in contradiction was submitted, though the witnesses were cross-examined by the attorneys for the State and the scrip claimants.

I therefore conclude that the rights of Farrand are paramount to those of the other claimants, and that his filing should be received.

Alice A. Condit's preemption claim for west half, with south half of east half and lot 2 of southwest quarter (being the fractional southwest quarter) of section 20, conflicts with the homestead declaratory statement of Orrin L. Mann, and the additional homestead applications of Randolph Crowley and Robert Price. Mann's homestead declaratory statement offered January 15; Crowley's and Price's applications filed January 14, 1875; Mrs. Condit's declaratory statement offered at hearing.

It is shown that Mrs. Condit's husband went on the land in the summer or autumn of 1872, and built a house, but died in March, 1873, without having occupied the same; that in August, 1873, Mrs. C., with her two children, moved into the house, all remaining there for a short time, when, finding she could not obtain schooling for the children without going to Englewood, she went thither with them, leaving her goods, &c., in the house. During her stay on the land she did some planting, seeds, &c., and made what improvements she could. After her removal to Englewood she returned at different times to look after her claim, and her elder son usually went to the house on Saturdays, remaining until Monday, in occupation and possession. In the latter part of December, on his usual weekly visit, he found part of the household articles had been removed, and the door of the house taken away. He immediately informed his mother, who at once procured more goods and articles to repair the damages with, and proceeded to the house for that purpose. While so engaged, on the 23d December, 1873, one Ellis Bennett and others forcibly dispossessed her, tore down the house, and burned the material. In the spring of 1874, when she again attempted to return, Bennett a second time drove her away, treating her violently, so that she was afraid to again attempt to resume her occupation of the land. She instituted suit against him for forcible entry and detainer, which was decided in her favor, and from which appeal was taken by Bennett. From September, 1874, until the hearing, she was sick, and unable to avail herself of the decisions in her favor by again taking up her residence on the land.

As before stated, the papers in the case contain affidavits setting

up the claims of Ellis Bennett and John Collins, covering this land and lot 3, but I find nothing therein tending to invalidate Mrs. Condit's claim, or that of Farrand for lot 3. Bennett admits that he actually abandoned on account of Mrs. Condit's superior right, and on promise of immunity from prosecution for his acts. Their claims were not presented at the hearing, and do not appear to merit consideration.

I think the evidence sufficiently establishes the good faith and necessary acts of Mrs. Condit, and that, therefore, her claim is superior. If this be the final decision, her declaratory statement will be received.

Lot 1, of southeast quarter of section 20, is claimed by James Brown, *alias* Washington, as an additional homestead, and by Jabez G. Smale, in connection with lots 1 and 2 of northeast quarter section 29, as a soldier's homestead.

Although the Register and Receiver in their report treat these claims as if filed simultaneously, I find that Brown-Washington's application is endorsed as having been received at 9 o'clock a. m. January 14, and Smale's declaratory statement as received at 9.35 a. m. same day. Brown-Washington's application being first received, I think he is entitled to the land.

The homestead declaratory statement of Jabez G. Smale, for lots 1 and 2 of northeast quarter section 29 (in connection with lot 1 southeast quarter section 20), is in conflict with the additional homestead application of Dorcas Matlock, covering the same land; Smale's homestead declaratory statement filed at 9.35 a. m., and Mrs. Matlock's additional homestead application filed at 9 a. m., January 14, 1875.

Smale's claim for land in section 20 has already been passed upon.

Notwithstanding the application of Mrs. Matlock appears to have been first presented, it is not accompanied by proof or *prima facie* showing of her right to land under the additional homestead law, and an examination of the papers in the entry of Cass Matlock, whose widow she claims to be, shows that no mention of military service was made therein. Smale presented *prima facie* evidence of military service, and followed up his homestead declaration by filing homestead application for the land July 12, 1875. But that application is defective, because, although the affidavit is taken before the clerk of the circuit court, it does not show that Smale was actually residing upon the land, in which event only could the affidavit have been made before such officer.

Neither party alleges settlement; both claims as presented are imperfect, and therefore I think the time of filing should govern in deciding between the parties. For that reason I think the claim of Mrs. Matlock should be considered superior, if she can furnish the necessary proof of her right to make additional entry.

Solomon Field claims the south half northwest quarter, and north half, southwest quarter section 29, under the preemption laws. Declaratory statement dated February 1, 1875, alleging settlement

June 27, 1874. This claim is in conflict with the homestead application of L. D. McDaid, the homestead declaratory statement of Syrena McDaid, the homestead declaratory statement of Thomas S. Mather, and the additional homestead applications of T. C. Wilkerson, John White, John E. Curtis, and J. W. Smith, all filed January 14, 1875. Affidavits have also been filed by C. L. King, alleging his claim for the entire southwest quarter, but, for the reasons heretofore stated in the cases of Bennett and Collins, such claim cannot be considered.

The testimony shows that Field went upon the land June 23, 1874, and, after examination, determined to preempt it. On 27th June he commenced erecting a substantial house and dug a well; was ordered by Ellis Bennett to desist, but continued, and by night had the framework of the house partially set up. During the night he was arrested at the instance of Bennett and taken to Hyde Park, but no one appearing against him, was released after a day or two of imprisonment. Returning to the land he found it, with his improvements and material, in possession of King, who claimed under Bennett; demanded possession, which was refused; instituted suit against Bennett and King, which appears to have been decided against him by the justice of the peace, from whose decision he appealed, which appeal was pending at the time of the hearing.

Much of the testimony was directed to the question of Field's competency as a preemptor, but it fails to show his want of qualifications. Its whole tenor shows his good faith and performance of the necessary legal acts to obtain possession of the land after he had been forcibly dispossessed. I think his rights are fully shown, and that as against the other claimants his filing should be received.

Lyman D. McDaid's homestead application, already partially passed upon, also covers the north half of the northwest quarter section 29, for which it is in conflict with the additional homestead applications of Thomas C. Wilkerson and John White. McDaid's application was received at 9:35 a. m., and the others at 9 a. m., January 14, 1875.

The testimony in McDaid's behalf shows that immediately upon the completion of the survey, September 29, 1874, he went upon the land and commenced the erection of a house which had been prepared for that purpose pending the survey. While so engaged, Bennett and King came and drove him and his helpers away. From that date until the filing of his homestead declaratory statement and application he does not appear to have done anything to repossess himself of the land, or assert any right thereto, and his affidavit, though executed before the clerk of the circuit court, does not allege his residence upon the land. I cannot therefore consider his equities as any greater than those of the additional homestead claimants, and as their applications were filed first, I think they are entitled to the benefits of their promptitude. Wilkerson's application should be received so far as it relates to the northwest quarter of the northwest quarter, as also should White's applica-

tion in so far as it embraces the northeast quarter of the northwest quarter.

The additional homestead application of Samuel Davis, already partially disallowed, also embraces lots 3 and 4 in the southeast quarter section 29, which claim is in conflict with the homstead declaratory statement of Syrena McDaid. Davis's application was filed at 9 a. m., and McDaid's declaratory statement at 9.35 a. m., January 14.

Davis's application being first in point of time, is first in point of right; and his claim is strengthened by the fact that McDaid has not attempted to follow up his declaratory statement by making homestead application, although more than three years have elapsed. If Davis can furnish proof of military service, which is now wanting, his application, so far as it relates to these lots, should be received.

Thomas S. Mather claims, in his homestead declaratory statement of January 14 and homestead application of June 1, 1875, the fractional southwest quarter of section 29. So much of this claim as embraces the north half of the southwest quarter has already been passed upon and rejected, in considering the claim of Solomon Field, leaving the southeast quarter of the southwest quarter and lot 5 for consideration. It conflicts, in regard to these tracts, with the additional homestead applications of John E. Curtis and James W. Smith.

His homestead declaratory statement was filed at 9.30 a m.; their applications at 9 a. m. No settlement is alleged by any of them; therefore, the first in time is first in right. In this respect Curtis and Smith are prior to Mather, and Curtis's application, so far as it covers lot 5, should be received, as also should the application of Smith, so far as it embraces the southeast quarter of southwest quarter.

Chester B. Rushmore claims, under the preemption laws, the east half and lot 1 of northeast quarter section 30. Declaratory statement offered at hearing, and amended to cover tracts. Settlement alleged April 15, 1874.

This claim is in conflict with the additional homestead applications of R. H. Cummings and John O. Medlock.

The testimony shows that Rushmore settled as claimed; erected a substantial house and outhouses; cultivated about half an acre, and resided on the land continuously until the hearing. His settlement and acts appear to have been *bona fide*, and of such a character as to constitute compliance with the requirements of the preemption laws. His rights, as against the other claimants, are paramount, and his filing should be received.

Franklin A. Cleveland's preemption claim covers the northeast quarter southeast quarter, and lot 3 of southeast quarter, section 30, with lot 1 of northeast quarter section 31. Declaratory statement filed and amended at hearing, settlement being alleged June 3, 1874.

This claim is in conflict with homestead declaratory statement of

Charles Carpenter and additional homestead applications of James Washington and Dorcas Matlock. It is also in conflict with the informal claims of Joseph Könyvesy and Anna E. Rees, neither of which have been presented in proper manner or followed up, and which, therefore, do not merit consideration.

It may be questioned whether what Cleveland did prior to June 22, 1874, would enable him to properly claim settlement on June 3; but the evidence proves that, on June 22, 1874, he commenced the erection of a house on the land; that while so engaged, on 25th June, parties tore down the house, destroyed the material, and drove him away; that he returned on 26th, and, on being refused possession, had the parties arrested. Then, on 18th August, he commenced the erection of a house 13 by 18, with wing, into which, when finished, he moved with his family, residing therein since. He had dug a well, built outhouses and barn, fenced and cultivated about an acre, mowed hay, &c., up to the time of hearing.

I think he is clearly within the requirements of the preemption laws, and that his rights are superior to those of the other claimants. So holding, his declaratory statement should be accepted.

George Hawks claims lot 2 of southeast quarter section 30. Homestead declaratory statement dated April 30, 1875, indorsed as received May 3, 1875.

This claim is in conflict with homestead declaratory statement of Charles Carpenter, received January 15, 1875, additional homestead application of John O. Medlock, received at 9 a. m. January 14, and the informal claim of Joseph Könyvesy, heretofore alluded to, and which cannot be considered.

None of the remaining parties allege settlement, and, as between them, the rights of Medlock are superior, his application having been filed first. So much of it, therefore, as covers this tract should be accepted.

Peter Munhoven claims the northeast fraction (lots 1, 2, and 3,) lots 1, 2, and 3, section 32. Homestead declaratory statement filed January 14, 1875, at 9:35 a. m. Homestead application same date.

This claim conflicts with additional homestead application of William Brewer, filed at 9 a. m. January 14, and with an informal claim of Charles E. Rees, which, not being properly presented, cannot be considered.

In Munhoven's behalf it is alleged that he went on the land September 8, 1874, built a house, and has since resided therein.

Mr. Cleveland, who testifies in the case, says Munhoven settled as alleged; that a house was built by him and others in September, 1874, in which he had resided up to time of hearing, but which house was built of material purchased by himself (Cleveland) with money furnished for the purpose by Mr. McDaid. No evidence of cultivation or improvement was offered.

In reporting upon this claim the district officers say they are satisfied from the evidence that any improvements made in this case cannot be considered of such a nature as to give Munhoven any

priority thereby. In this opinion I concur, and decide that as neither has rights superior to the other in equity, Brewer has the better legal claim for the land, and his additional homestead application should be received.

After rendering an opinion upon all the claims involved in the case, the district officers add a note stating that parties representing Thomas C. Wilkerson, John White, James Brown, Dorcas Matlock, and William Brewer, additional homestead applicants, Edward Hudson and John V. Dumerce, Sioux half-breed scrip claimants, and Charles D. Gilmore, Porterfield scrip claimant, have made application to withdraw *parts* of their claims.

I find no such application among the papers in the case. All the Porterfield scrip in the case was withdrawn by direct application to this office, but the Sioux half-breed scrip has not been. On the contrary, an application made for its withdrawal was revoked.

Inasmuch as the papers do not show the authorization of any one to act in behalf of the additional homestead claimants, and no application by them, or for them, for withdrawal of their claims, is found among the original papers, or has been made to this office, I cannot consider the statement of the Register and Receiver as embodying a proper application for that purpose, and have therefore passed upon the claims as presented.

Recapitulating my conclusions in the case, they are:

1. The claim of the Illinois Central Railroad Company, under the granting act of September 20, 1850, for the land in sections 20, 30, and 32, should be rejected.

2. The claims of the State of Illinois and Cook County, under the swamp lands grant of September 28, 1850, for the lands in controversy, should be rejected.

3. The claims of Gertrude Hardin and Horatio B. DeWitt, under laws relating to riparian rights, for lands in sections 19, 20, 29 and 30, have been rejected by the action of the department in ordering and approving survey of the land.

4. The various locations of Sioux half-breed scrip, as enumerated and described, should be canceled (and they are now held for cancelation), and the attempted locations rejected.

5. The preemption claim of Andrew Farrand for lot 1 of northeast quarter and lots 2 and 3 of southeast quarter, section 19, together with lot 3 of northwest quarter, section 20, should be allowed.

6. The preemption claim of Alice A. Condit for west half southwest quarter, south half of east half, and lot 2 of southwest quarter, being in all the fractional southwest quarter, section 20, should be allowed.

7. The additional homestead claim of James Brown, alias James Washington, in so far as it embodies the southeast fractional quarter or lot 1 of section 20, should be allowed.

8. The additional homestead application of Dorcas Matlock, in so far as it embraces the fractional northeast quarter (lots 1 and 2),

section 29, should be allowed if she presents proof of her husband's military service.

9. The preemption claim of Solomon Field for the south half northwest quarter, and north half southwest quarter, section 29, should be allowed.

10. The additional homestead application of Thomas C. Wilkerson, in so far as it embraces the northwest quarter of the northwest quarter, section 29, should be allowed.

11. The additional homestead application of John White, in so far as it embraces the northeast quarter of the northwest quarter, section 29, should be allowed.

12. The additional homestead application of Samuel Davis, in so far as it embraces lots 3 and 4 of the fractional southeast quarter, section 29, should be allowed if he presents proof of military service.

13. The additional homestead application of John E. Curtis, in so far as it embraces the fractional southwest quarter of the southwest quarter, or lot 5, section 29, should be allowed.

14. The additional homestead application of James W. Smith, in so far as it embraces the southeast quarter of the southwest quarter, section 29, should be allowed.

15. The preemption claim of Chester B. Rushmore for the east half, and lot 1 of the northeast quarter, section 30, should be allowed.

16. The preemption claim of Franklin A. Cleveland for the northeast quarter of the southeast quarter, and lot 3 of southeast quarter, section 30, together with lot 1 of the northeast quarter, section 31, should be allowed.

17. The additional homestead application of John O. Medlock, so far as it embraces lot 2 of the southeast quarter, section 30, should be allowed.

18. The additional homestead application of William Brewer, for lots 1 and 2 of the northeast quarter, and lot 3 of the northwest quarter, section 32, should be allowed.

19. All other claims and parts of claims under the preemption and homestead laws should be rejected.

Should this decision become final, the declaratory statements of the preemption claimants, whose claims are allowed, will be received as of dates tendered, and on showing proper compliance with law such claimants will be permitted to make entry of the land embraced in their filings.

The additional homestead applications, as allowed, will also, in the event of this decision becoming final, be received as of dates tendered, and certificates will issue thereon on payment of proper fees and commissions.

In the cases of John E. Curtis and Dorcas Matlock, however, proof of military service will be required before issue of certificates.

Sixty days will be allowed for appeal from this decision to the honorable Secretary of the Interior.

Respectfully, J. A. WILLIAMSON,

Commissioner.

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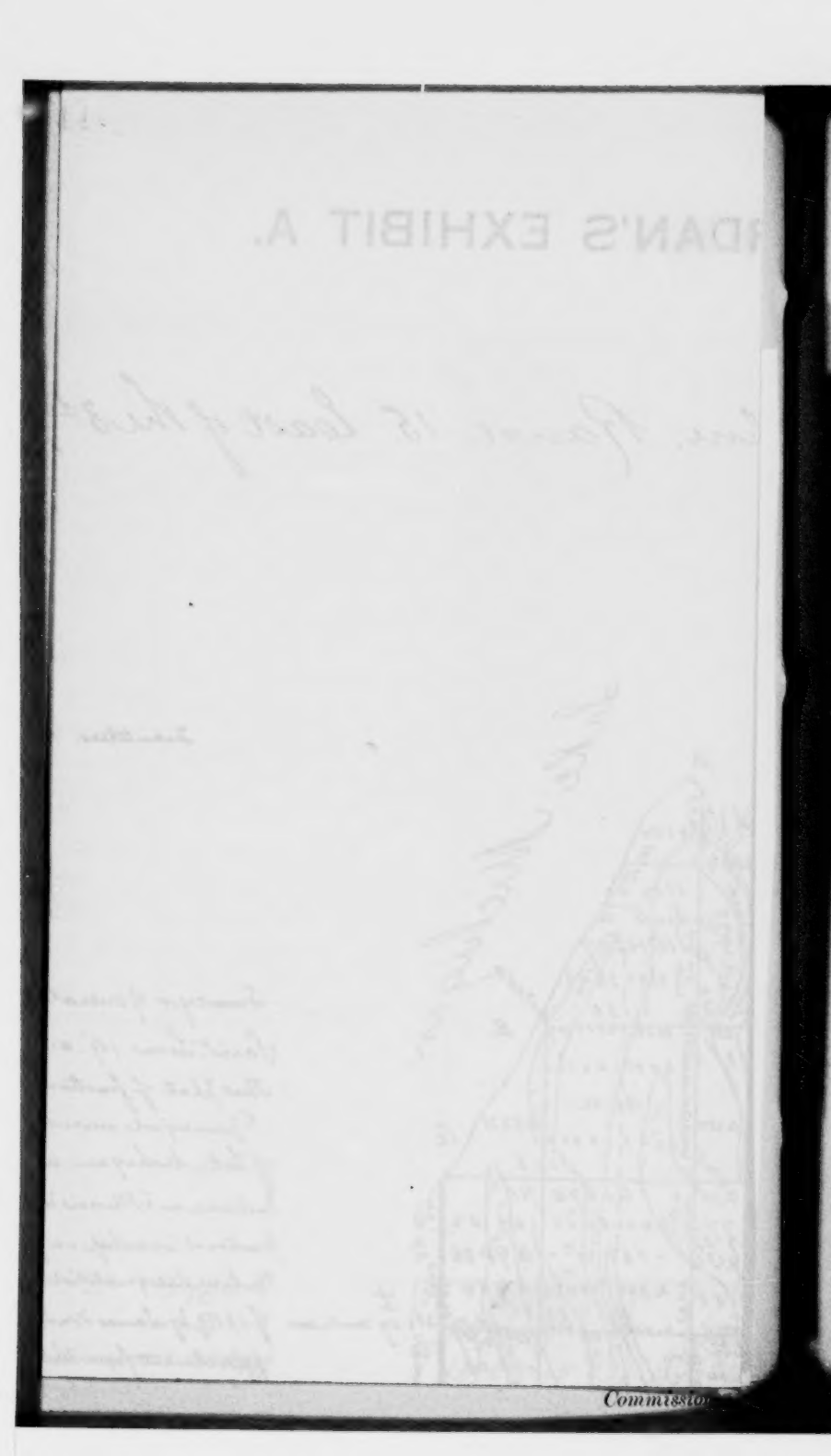

To Messrs. C. H. Willett, C. H. Wood, Bennett, Krettinger & Veeder, H. O. McDaid, John R. Lewis, Isaac R. Hitt and I. N. Hardin, Chicago, Illinois; Curtis & Earle, C. D. Gilmore, A. A. Hosmer and S. V. Niles, Washington D. C.; William Prescott, Springfield, Illinois, and J. A. Crawley, LaPorte, Indiana.

Copy of plat of the survey of Alexander Wolcott in 1874:
(Said map is herein inserted, marked Jordan's Exhibit A.)

E. B. Department of the Interior, J. S. W.
General Land Office, S. J. D.

Washington, D. C. Oct. 27, 1882.

I, L. Harrison, acting Commissioner of the General Land Office do hereby certify that the annexed copy of the plat of the original survey of township 37 north range 15 east, 3rd P. M. Illinois, embracing the plat of the survey by Alex. Wolcott, in September, 1874, of a meandered lake in certain sections in said township, is a true and literal exemplification of the original plat on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

L. HARRISON,
[SEAL.] *Acting Commissioner of General Land Office.*

Wednesday, November 4th, 1891. 10 o'clock A. M.

J. P. MUNHOVEN, a witness called on behalf of the defendant Franklin A. Cleveland having been first duly sworn testified as follows:

Direct Examination by MR. DOUTHART.

Q. Where do you live? A. In Section 32, in Hyde Park Township.
Q. Do you live between Wolf & Hyde Lakes? A. No.
Q. Where do you live, as to Wolf Lake? A. South of Wolf Lake.
Q. How far South of Wolf Lake? A. Touching it.
Q. How long have you lived there? A. Since 1874.
Q. You are a man of family? A. No sir, single man.
Q. I will ask you if you know Franklin A. Cleveland? A. Yes, sir.
Q. How long have you known him? A. I have known him since '61.
Q. Did you know of Mr. Cleveland's living down by these lakes? A. Yes, sir.
Q. Where did he live? A. Well, he lived on two sections west of 32, that is on two sections west touching 32. * * *

Cross-Examination by MR. DENT.

* * * * *

Q. Do you know where the line between Sections 30 and 31

was? A. You mean the two sections west of the west section of 32? I don't remember. You understand me do you?

Q. 31 would be west of 32? A. Yes sir.

Q. And 30 would be North? A. That is the two Sections Cleveland's homestead is on, the two Sections. I know that line.

Q. Mr. Cleveland's house was south of that line? A. Yes sir on the Section south of that.

Q. His barn was where? A. That was on the cross section line on the north line of the quarter section.

Q. His barn would be on Section 30? A. That is a different section, yes sir.

Q. And where was the land that he cultivated? A. It was south of the house on the same section as the house, and there was some north of the house, north of the barn, over there north.

Q. Was there very much north of the barn do you think, or remember? Was it not high grass there? A. Where he ploughed it was dry enough; I don't recollect how much he cultivated there. He had a crop there.

Q. Was it a small quantity that he had north of this barn? A. I could hardly think it was more than about an acre or so, maybe a little more or less, I could not say.

Q. When did he cultivate that or plough it? Do you know when he began to cultivate or plough it? A. I would think it was the second year he was there. I am a little in doubt whether it was the third or not.

Q. Do you mean that Mr. Cleveland himself did that? A. Yes sir, I seen him work there, I did myself.

Q. Mr. Cleveland was not there all the time as I understood you; other persons were on the place? A. Yes sir. That is, the third year, some other people came after Cleveland.

Q. Did the water come up near his house or barn at times? A. Oh, yes.

Q. How was it the first season he was there, was it high water then? A. That was fairly dry. You could cut most of the grass, of the hay when Mr. Cleveland came there first.

Q. That was in 1874? A. 1874, yes sir.

Q. That was a very dry season was it? A. Yes sir.

Q. How far out was the grass cut from the road? A. It seems to me that most of the whole ground was cut.

Q. How was it the next year as to cutting grass, was it high water then? A. No sir, yet it was higher.

Q. The water was higher? A. Yes sir.

Q. How much of the time was the water high the next year, about how much? A. As near as I can gather, I can remember it, it was up, but we could make hay; at the same time we had sometimes to go in the water. Myself could not do it as good as Mr. Cleveland and his boys.

Q. How deep did you have to wade in the water to cut hay? A.

Some places you may have to go in a couple of inches, may be you have to go up to half a foot.

Q. It was sometimes too deep for you to go there? A. Yes sir, close to the lake.

Q. Where did the lake extend at such time, where was the water in which you had to cut hay with reference to this Cleveland place? A. I cannot catch this.

Q. How near the house and barn did the water come? A. When the water was very high it came almost as close as to the barn, when the water was very high, and of course it extended back considerable.

Q. It was one sheet of water then when it came up close to the barn? One sheet of water all the way to the house? A. There was some little grass extending out.

Q. Out of the high water there would be some little grass extending out, but there would be water all over the surface of the ground? A. You mean trees like?

Q. Yes. A. Except off the ridges around the lake, that is a little high. * * *

Q. Did you assist Mr. Wolcott in making this survey of 1874? A. Yes sir, I did.

Q. Were you interested with Mr. Bennett as you have stated at that time? A. No sir.

MR. BENNETT: Objected to.

THE COURT: He says he was not.

You were afterwards interested were you?

Q. MR. BENNETT: Objected to.

A. Yes sir.

Q. How long did you remain interested with Mr. Bennett in the matter.

MR. BENNETT: Objected to.

THE COURT: Interested in what.

MR. DENT: Interested in the survey that was made in 1874.

Q. You stated you were interested with Mr. Bennett in part of Section 32 that was surveyed at the same time Mr. Cleveland's was surveyed? A. Yes, sir.

Q. When did you and Mr. Bennett become interested in that? A. I cannot say the date, it may be in the neighborhood of '77 or so, it may be '78, I could not give the date correct.

Q. Did Mr. Cleveland fence up to the lake, up to Hyde Lake anywhere? A. He run it to the outlet, on the other end he run to the lake on the southwest side.

Q. He run his fence down along the open water of the lake? A. Good enough to keep the cows out.

THE COURT: Q. Hyde Lake? A. Yes sir.

MR. DENT: Q. What kind of a fence was that? A. It was a board fence; he had very good posts, a part of it was cedar, I don't know all or not

Q. Two boards on them you said? A. I could not say

whether it has two or three, it was good enough to keep the cows out.

Q. Did not the water come up along that fence sometimes? A. Sometimes it did.

Q. Covered all the ground? A. And some of the fence.

Q. In the spring? A. When the water was high.

Q. In the winter sometimes? A. Of course in the winter when the water is low, then it is gone again. When the water comes low again, then it is low again.

Q. Do you remember at what seasons the water was high, whether in '74 or '76, what year? A. It appears as much as I have it in my mind, every year. It was very high in '75, it was the same in '76, that was still higher. It came up one year, that is the year when it was very high; that is '76 it is very high.

Q. After that how was it? A. Some years it was a little higher than others; but most years most of Cleveland's was most dry enough to mow all the time.

Q. Did you notice any change in the land as becoming dryer since 1874? A. Just as the lake rises. The lake rises and falls as Michigan Lake does; of course the water is just as I have seen it at first, but at present it is very low.

Q. It is very low at this season? A. Yes sir. It was for a few years, and then it was as it was before.

Q. Was the lake dependent upon Lake Michigan for water to some extent? A. It appears to me that the water naturally follows Michigan Lake, except in the olden time, then the water had to evaporate out of Hyde Lake, and Hyde Lake, except now we had it improved and it runs off quicker.

Q. There is a quicker evaporation of water from Wolf Lake and Hyde Lake in the summer season? A. Yes sir, in the old time it had to evaporate out. We had no ditches; in the old time we had no ditch out of Wolf Lake to go into Michigan Lake.

Q. Did you know of any outlet to the west at first from Hyde Lake to Calumet River? A. Yes sir, there was a kind of small ditch.

Q. Were boats taken from Hyde Lake to Wolf Lake? A. The same way when the water was high, and then we could go. When the water was low they could not.

Q. If it was a hard rain in the spring? A. Sometimes—

Q. Calumet River was an outlet merely? A. In the river?

Q. Yes sir. A. I could not have no idea to say that it was with much of a current.

THE COURT: Q. Did you ever see it run there? A. I could not say whether I see it run in or out.

MR. DENT: Q. How was it as to the outlet from Lake Michigan? Did the water pour into Wolf River and then into Wolf Lake? A. Michigan Lake used to blow the gravel over on the old Wolf River, and then to get the water out of Wolf Lake and Hyde Lake, we made of Wolf Lake, we made a ditch from Wolf River

to Michigan Lake; and when we had a good wind a couple of days, then the wind blew from the south and the water came from Wolf Lake, and we had a big ditch.

Q. When was that ditch made? A. That was made several times. I helped make it myself, helped Mr. Cleveland and some others. We went to make that ditch to get the water out of Wolf Lake.

Q. Did you make that ditch in the same place? A. Generally on the foot of Wolf River that is close to Michigan Lake, it may be 15 rods apart.

Q. The ditches were in different places or in the same place? A. Pretty near.

Q. When it was open would the water of Lake Michigan flow into Wolf Lake? A. I didn't see flow in. When we were in Wolf Lake the water flowed out and then it made a ditch itself; the water made to wash the ditch out until Wolf Lake was even with Michigan Lake.

Q. Would not the water flow the other way, and flow up Wolf and Hyde Lake again? A. I do not think that the water could flow in from Lake Michigan to Wolf Lake.

Q. Did you go from your house to Mr. Field's place in a boat sometimes? A. Yes sir.

Q. How near was the water to his house at such times?

MR. BENNETT: I object to that.

(Question read.)

A. I think you will see six to ten rods.

Q. How near was the water at the same time to Mr. Cleveland's barn? A. Just as I say, just overflowed the meadow; it came just as near to that.

THE COURT: Q. Came very near to the barn? A. Yes sir.

MR. DENT: Q. The water covered almost all the intervening space then between Mr. Cleveland's barn and Mr. Field's place?

Objected to by Mr. Bennett.

A. No sir, there is a high ridge there. You mean where the house is standing?

Q. Yes, sir. A. That is East of Mr. Cleveland's place?

Q. Yes, sir. A. Yes, sir, that is the high ridge never covered with water.

Q. Between the two houses, between Mr. Clevenand's house and Mr. Field's house there was water? A. Yes, sir, there is what we call the outlet.

Q. Was there water besides?

Objected to by Mr. Bennett.

THE COURT; I don't think it is cross-examination. I feel inclined to restrict this. If you want to call him as your witness you can do so. I don't see how it is strictly cross-examination.

Re-direct Examination by MR. DOUTHART.

Q. Did you ever see Wolf Lake and Hyde Lake all one sheet of

water clear across at Cleveland's place? A. There is a kind of outlet there.

Q. A whole lake clear across. A. No, sir.

Q. Now when there was high water there, how much clear land would there be on the Cleveland track that was not covered with water, about how much. A. You mean the very highest? I don't think it was more than five or six acres.

Q. At the time the water was highest there was not more than five or six acres of the Cleveland tract that was covered with water? Let me ask you, when the water was highest, what time of the year was it, fall on spring? A. In the spring in the early part of the summer.

Q. After the snow and ice had melted? A. Yes, sir.

Q. Did you ever see it in summer? A. It came sometimes.

Q. How would it be in July and August? A. It would not be as high as that. The two years, '76, then it was high, I could not go one-third across without I go into water.

Q. Do you know when Mr. Field opened that ditch? A. Yes, sir?

Q. Did you ever have any high water after that? A. As soon as the wind blew from the north it filled the ditch up, and then it was as before.

Q. While that ditch was open did you ever have high water? A. It was only a few days open.

Q. You say you went in a boat from your place up to the Field house? A. Yes, sir.

Q. How did you go from your place up to the Field place? A. I went in a boat.

Q. Which way did you go in the boat? Did you go in Wolf Lake or Hyde Lake over Cleveland's land? A. I went through Wolf Lake.

Q. Around this way? A. I came from the south point.

Q. Did you go through that cut off? A. No, sir, I didn't go so far north, I went further south.

Q. This is north up this way, you went up into Wolf Lake when you went with the boat? A. Yes, sir.

Q. Did you go opposite the Field house? A. Yes, sir.

Q. Did you get out of your boat and walk over? A. To the house?

Q. When you got out of the boat how far did you go overland until you got to Field's house? A. I will say ten rods or so, a little more or less.

Q. Did you ever go in a boat over Cleveland's land? A. No, sir.

Q. Why not? A. It was not water enough.

Q. Was not there water enough in high water? A. It would not be to go over in a boat.

Q. You mean to say that this Cleveland tract was covered with water. How high was the water on the land? A. It

may be a foot on part of it, it may be a little less than a foot.

Q. How far would it be overland altogether? A. I would not make the whole thing go a few feet.

THE COURT: I understood you that in very high water there were five or six acres that were covered with water.

MR. DOUTHART: Q. What do you say about that. In high water you mean it went all over his land except five or six acres? A. Yes, sir.

Q. How long would that stay that way? A. Until the water had kind of a chance to evaporate, until we made a ditch.

Q. That was in the spring when the snows come? A. And there was a couple of years we had very wet seasons, that must be '76.

Q. I understood you that this water came in there over the country round about? A. Yes, sir.

Q. It didn't come in from Lake Michigan? A. No, sir.

Q. You say you assisted Wolcott to make this survey, what did you do? A. I helped to carry the chain and done some helping.

Q. Did you have anything to do with getting Wolcott there? A. Yes, sir, we had some kind of attorneys that was trying to make my homestead like Mr. Cleveland's was, and we had to help to do the surveying.

Q. This Cleveland tract was usually dry enough to cut grass on, was it not? A. Most of the time.

Q. How many years was it you could not cut grass off during the six or seven years? A. I will say there was two or three years. That '76 was very bad.

Q. What other year was it? A. Another year, too, I don't know whether the year before or the year afterwards it was very wet too, but not as bad as '76.

Q. All the other years how was it? A. Mostly dry enough to cut.

Q. Was it dry enough to plough? A. Part of it was.

Q. All but around the lakes? A. Yes sir.

Cross-Examination by MR. DENT.

Q. Did you join with others in paying Mr. Wolcott for the survey? Did you join with others and raise a fund to pay Mr. Wolcott for surveying these lakes?

THE COURT: Q. Did you help pay Wolcott? A. I didn't have to pay him. I think the Government did that.

MR. DENT: Q. What kind of grass was that that was cut on this Cleveland tract? A. I will not say it is the very best prairie hay; it is what we call low land hay. There was some they call spin hay.

Q. Tall grass? Is it called wire grass? A. That's what you call wire grass, I call it spin grass; it has the same meaning.

Adjourned to 10 o'clock, November 5th, 1891.

SOLOMON FIELD, a witness called on behalf of the defendant Conrad N. Jordan, having been first duly sworn, testified as follows:

Direct Examination by Mr. Bennett

Mr. Bennett by agreement with Mr. Dent, one of the counsel, offered and read in evidence the deposition of Mr. Field, upon which Mr. Dent cross-examined the witness.

* * * * *

Cross-Examination by Mr. Dent.

Q. Where was the house, Mr. Field, the two or three acres you fenced? A. Sir?

Q. Where was the house you built? A. It was on the South half of the quarter I preempted.

Q. On the south eighty? A. Yes, sir, on the south eighty.

Q. That would be the north half of the southwest quarter of Section 29? A. I ain't a good hand to describe a Section. If I was going to describe it I should call it the South eighty. I ploughed from the house down to the line of that eighty, two or three acres besides north of the house and both sides of the house on that side. I ploughed to the channel between the house, what we used to call a channel. It is a ditch.

Q. The house, as I understand now, was on the north half of the southwest quarter of Section 29. Now I want to know where the two or three acres that you enclosed were. You said you enclosed two or three acres about the house. A. I told you from the house right straight north.

Q. What part of that eighty? A. Well it is on the eighty.

Q. What part of that eighty? A. The fence. We fenced it on the north, that was the division fence between the two eighties.

Q. Then it was near the north line of the south eighty? A. Right there, sir.

Q. The north line of the fence was the division line between the two eighties? A. Yes sir, that is to the best of my recollection.

Q. Which way did the two or three acres extend? A. Right up and down on the bank, north and south.

Q. Did it run regular or irregular. How did the fence run? A. Pretty near straight, as I could drive my team when I got to the timber where the barn was, I had to make a little jog to go around the barn on them big trees there; some of them are three feet through and I could not plough the roots.

Q. At what season did you fence the two or three acres? What time of the year? A. It was not so early as it had been in the spring. When I first ploughed I planted corn and some potatoes.

Q. What year was it in do you remember? A. I am not cer-

tain, but I think it was the second year that I done ploughing; it might have been the first.

Q. It was 1879 if it was the second year was it not? A. It was one of the two, I cannot tell you which sir. I did not pay any attention to it. I fenced it and ploughed it and planted corn.

Q. What kind of a fence did you put there? A. I think I had posts and a board with a rail on top. I am pretty sure I did.

Q. Was any of the fence in the water at the time? A. Oh the water would come up around it sometimes; I didn't put any fence in the water when I fenced it.

Q. But the water would come up afterwards? A. Yes, sir. The water would rise and fall there.

Q. How often did the water rise and fall? A. Well, it didn't rise and fall very much except in the spring of the year; not in the winter time when the lake was frozen over. I recollect one time in the month of March the lake was frozen over pretty near solid, and then there came what I call a good big snow storm for Illinois, and it turned around and the water got up pretty high. It didn't run around the house.

Q. It got very near to your house? A. Yes, sir; but not so we could not walk around the bank on Wolf Lake.

Q. The water was around your house then? A. Yes, sir; so I believe.

Q. Did you have a well, or what did you have? A. I dug three or four wells and when I got the water out of them and examined it, it was brackish, we could not use it.

Q. You did not have to go very deep did you? A. My recollection is, in front of the house it was about three and one-half or four feet deep. I think a barrel would not go down deep enough so that we could get any water.

Q. Two or three acres were along the ridge were they not? A. On the west side of the ridge, I never ploughed the ridge, of the highest part of it, I ploughed on the west side.

Q. Of the ridge? A. Yes, sir.

Q. Where was the ridge with reference to the east line of the two eighties? A. The ridge was nearer the west line than the east line.

Q. You think it was nearer the west line than the east line? A. Yes sir, I guess I am right. Is not the railroad on the west line to it?

Q. I could not say. Your ploughing was done west of what you call the ridge? A. Yes sir I want you to understand that.

Q. How much fence was west of what you call the west ridge? A. The fence was pretty near the top of the ridge, a little over on one side.

Q. When you struck the lake on the west, did you run a fence down the lake or along the lakeside? A. On the west?

Q. Yes sir, A. I didn't run no fence on the west line.

Q. Did you strike Wolf Lake on the east with your fence? A. Yes sir, it run a good many rods out into the lake, so my cattle would not go around it.

Q. You run the fence out into the lake? A. A good ways into the lake in the water it was soft soil; it was boggy soil. I could get out there and shake an acre where the railroad stands to-day.

Q. If I understand it, you run your fence on the Hyde Lake side out to the lake? A. Out to the lake on the north line.

Q. Was it on the south line too? A. I run it out to Wolf Lake on the south side.

Q. Did you run to Hyde Lake on the south? A. No, sir, I run against Mr. Cleveland. He shut me off with a board fence.

Q. Then it was only on the north line that your fence extended out to Hyde Lake—not on the south line? A. To Hyde Lake, no, sir. I told you I could not go any farther than Mr. Cleveland's.

Q. There was a kind of ditch dug by you before you settled there was there not between the two lakes? A. Yes, sir.

Q. Where was that ditch with reference to your possession. A. Well it went right across it, nearer the south line than it did the north line.

Q. What was your ditch called? Did it have a local name? A. They called it ditch leading from Wolf Lake to Hyde Lake. I wanted to fill it up and they would not let me.

Q. Do you know where Reese's Point was, what was called Reese's Point? A. Not by that name.

Q. You know where Reese lived? A. Yes, sir, I know where his house was.

Q. Where was it? A. Away up south of mine.

Q. Did you yourself do any grading upon the premises near the ridge anywhere, or in making any road or anything of that kind? A. Yes, sir, I made a turnpike road from that ditch clean down to Miss Condit's, right where that big timber is, turned it all up by the plough.

Q. You used a scraper and made a ditch on each side didn't you? A. There was one or two lower places that I used a scraper to fill up them holes, that was all.

Q. What was the soil on that ridge if you remember. A. Well, when I got to ploughing, I got to ploughing up some of the gravel and sand from the bed of the lake.

Q. That was covered with water sometimes. A. I have seen most of it covered with water, all except this high ridge I didn't fence. I never seen that covered in any place except to go down to my north line. I have seen it covered there so that, well I have walked across there when I had hard work to walk without getting my boots filled with water.

Q. Was there any grass growing there? A. Yes, sir, the grass was big and high around it, and over below where I went clean up to that ditch I mowed it with a mowing machine.

Q. What kind of grass was it that grew there? A. When I brought it up to the City, they called it spin grass.

Q. Was it such grass as grows in lakes and swamps? A. No, it was fine wild grass, just as they use to make rope of. It was pretty valuable hay and paid me $11.00.

Q. It was not good for feed was it? A. We fed it, but at the same time I didn't like it for feed.

Q. When you sold it you sold it for other uses? A. They called it spin hay. There was an old Dutchman came down there and bought it. I think I contracted 80 tons one year.

Q. You remember where the Condit house was? A. Yes, sir.

Q. How near did you see water to the Condit house? A. I never thought of it before in my life. It was not very near, and yet it was not a great ways off.

Q. Wasn't it within a few feet of it? A. No, sir, because teams drove between the house and the lake, and it was wide enough to drive two or three teams there.

Q. Your road was raised up? A. No, sir, not a bit.

Q. In some places you used a scraper where you raised the road up. A. That was further up, further south a good ways, plum a half a mile.

Q. Didn't the lake come up to about the point where you said the teams could pass abreast near Mrs. Condit's house? A. No, sir. I never seen it up there within a few feet of the house.

Q. You mean within a few feet of the house? A. Yes, sir. At most, I should say now, I do not think it was within two rods of that road, but maybe I am wrong, I don't believe I am though.

Q. How near to the house on the west did the water come? A. To that house?

Q. Yes, sir. A. Well, I never thought. I will give it as near as I can in my eye. I should think there was not any water west of the house within forty rods, and I don't know but still further.

Q. You don't mean now at times of high water or freshets? A. Not the highest water. When the water got pretty high, there was a little water in between the two roads.

Q. How near did the water come at such times as those you have just mentioned? A. Several rods.

Q. Do you remember whether high grass grew along there near the house? A. Yes, sir.

Q. Was that swamp grass, such grass as you have been describing? A. No, that was coarser grass. It was not this fine spin hay.

Q. Was that a mucky soil there? A. Yes, sir.

Q. You stated that you could stand there somewhere and shake the ground for an acre about you? A. There was one place on my north quarter that I think I could shake an acre in hay time.

Q. How could you do that? A. By springing myself up and down like a teeter-board.

Q. It was very deep, was it not? A. I never could find out when piling on it. I run a pile down there to find where the bottom was, and I don't know how the railroad found it. They put a railroad on that same spot.

Q. Don't you know the railroad is raised up some? A. Yes, sir, I did see that. I found that out then. I was afraid of falling off into the ditch.

Q. That is a large wide ditch, a deep ditch isn't it? A. Yes, sir. They told me they got fish in the ditch now.

Q. How does that railroad ditch compare with the ditch going across the two lakes, in size. A. It is a good deal deeper sir.

Q. Is it wider also? A. Yes, sir, I think it is.

Q. Did you ever observe whether water flowed into this ditch between the two lakes? A. Yes, sir, I have seen it run both ways on that ditch.

Q. Sometimes with rather a strong current? A. It would depend upon the strength of the wind.

Q. Sometimes the lake would be a little higher than at others? A. Yes, sir.

Q. Did you observe the outlets of these lakes either from Lake Michigan or the Calumet River? A. Yes, sir, I observed them a good deal.

Q. What did you notice about this water? Did it come into the lakes or run out of the lakes? A. I went down there and looked through there and I made up my mind that Wolf and Hyde Lake was too high to satisfy me; that Lake Michigan should come clear there. I brought a yoke of oxen and went down there to open that channel, and they told me if I made that it would damage the country. I went and hired three men and took a yoke of oxen. I used an old scraper and this same Bill Barnes was driving the oxen there in the water, and my boots began to sink, and I looked at the nigh ox and he was sinking. I let the scraper go and got out; and in less than ten minutes we had a channel 100 feet wide and more than 12 feet deep. It run about two nights and two days and the wind turned and it cleared off, and I wanted to go down to the bridge with it, but they thought I had not better undertake that.

Q. What bridge? A. The railroad bridge up there.

Q. That was the bridge that crosses the outlet? A. That is the bridge across Wolf Lake.

Q. Was that the Michigan Southern Road? A. Yes, sir, I think it was before the Baltimore & Ohio was built.

Q. You spoke of the wind making some change in regard to your work. What direction was the wind in, do you remember, when you had to leave suddenly? A. It blowed right in there. When the wind got right, it would fill that channel in two hours. I have seen the waves come ten feet high.

Q. When the channel was open the water from Lake Michigan would flow in? A. I never seen it flow in.

THE COURT: I understood him that Wolf Lake would flow out. A. That is what I want you to understand.

MR. DENT: Q. I suppose that would depend upon the heighth of Wolf Lake? A. No sir. When I dug my ditch I run it straight; and when we came up to this point I dug my ditch right into Lake Michigan.

Q. You made an outlet that was different from Wolf River? A. I wanted to lower Wolf Lake with Lake Michigan.

Q. What was your object in doing that Mr. Field? A. I wanted to make more dry land.

Q. What season was that, can you fix it? A. I don't think it was the first year I came; I think it was the second.

Q. Can you say what time of the year it was? A. Early in the spring, pretty early in the spring.

MR BENNETT: Q. From the time you first knew this location down there in 1874, did you ever know the waters themselves to open the mouth of Wolf River either from Wolf Lake into Lake Michigan, or the other way? A. No, sir, I never did, and I don't think any other man ever did.

Adjourned to 2:15 P. M.

Re-direct Examination of Solomon Field by MR. BENNETT.

Q. Did you have a fence across on the north line of that 160 acres, the north line of your 160 acres? A. Yes sir.

Q. How far did it extend east and west? A. Oh, I cannot tell the number of rods.

Q. Did it extend to the lakes either way? A. Both ways, way out in the lake I should say.

Q. You speak about a piece of ground you could shake. Did you mow it? A. I mowed it every year. I had to mow it by hand and carry it off. I could not take a team on it, the biggest part of it.

Q. State, Mr. Field, how much land near your house and barn was cultivated. A. Well, I never measured it.

Q. Your best judgment is all I ask. A. Not a great ways from three acres, perhaps a little more.

Q. South of the house? A. A piece south of the house and north of the house and barn.

Q. Was the piece south of the house your garden? A. Yes, sir.

Q. How near did that come to the artificial ditch. A. I don't recollect exactly.

Q. About how far. A. Oh I should think about five rods perhaps.

Q. Did you cultivate the road east of your house? Did you raise crops or cultivate the ground east of your house, between the house and Wolf Lake? A. Not directly in front of the house. I cultivated it to the ridge. It was right there up to the house. I should say it was well, in the neighborhood of seven or eight rod.

Q. What did you cultivate there? A. I raised my corn and grain and potatoes.

Q. Did you raise any water-melon? A. Yes, sir, we had some little garden truck in that end.

Q. How much was there of that piece that was south of your place cultivated? A. There was the garden part I never measured it; the garden part was somewhere in the neighborhood of three-fourths of an acre south of the house.

Q. East of the house how much. A. I think I cultivated about three acres.

Q. There was still another piece north of the fence. A. North of the ditch.

Q. North of the barn which you cultivated, another piece than the two you mention? A. The fence made a jog at the end of the barn.

Q. Did you cultivate that piece? A. Yes, sir, it was north of the barn.

Q. But the piece north of the barn was fenced by itself? A. The piece north of the barn, that was all together. I made the jog. The other run up as far as the house. It was widest on the north end. It was pretty nearly square, only it was longer north and south than east and west.

Q. What did you raise there? A. Corn and potatoes and some garden truck up near the house.

Q. Did you cultivate any of this ground besides these two? A. Yes, sir, south of the ditch.

Q. About how much was there, what did you raise? A. I sowed it to oats and got some oats there.

Q. Did you ever sow buckwheat on that? A. Yes, sir, one year, I don't think I did every year, I did one year.

Q. Then you say you cultivated the ground south, how much and where? A. An acre or an acre and a half.

THE COURT: Q. South of what is your garden? A. Yes sir, both of these pieces was south of the garden.

MR. BENNETT: Q. How much did you cultivate there and what did you raise? A. There was something over an acre and a half I think, and I had some oats and considerable little stuff in there.

Q. Did you cut any hay there? A. I cut a little hay there one year.

Q. State how generally hay was cut on that land between these two lakes while you knew it, by anybody. A. How it was generally cut?

Q. How generally, that is, how often, how many years, how many times? A. It was cut every year I lived there, and sometimes I cut a little of it twice, but not very often, not very much of it.

Q. Did you raise crops there? Every year you were there? A. Yes, sir.

* * * * *

Q. While you lived on there from the first time you knew it, did you ever hear the place where your house was, that locality called Elm Island? A. I never did.

Q. Did you ever hear the place where Charles Reese lived or had lived, called Reese's Point? A. I never did. It was always called up to Charlie Reese's when I heard it.

MR. GREGORY: Q. What was your place called there on that place? A. They called it the grove, the little grove up there.

MR. BENNETT: Q. How large trees were there in that grove? A. Well now, I never measured them, I think they were two or three feet through.

MR. GOUDY: Q. In diameter? A. Yes sir, right through.

MR. BENNETT: Q. What was the size of the others? A. Oh, good sized trees all along there.

Q. When you first went there was there any undergrowth among these trees? A. Yes sir there was brush I cut out when I got there, but the big ones I let stand.

Q. If Frank Chandler has testified when you went away in the spring of '81, you went to Dakota, is that true? A. No, sir, I went to Sumner County in Kansas.

Q. Do you know Frank Chandler? A. No, sir, never heard his name until you mentioned it right here.

Q. Did you ever, while you were down there, know of anybody coming from one lake to another in a boat except through the artificial channel south of your house? A. I never did.

Q. Did you ever know the water to come within two inches of your place while you lived there? A. No, sir.

Q. Did you ever find it necessary to go from your house in a boat while you lived there? A. No, sir.

* * * * *

Q. Who occupied your house, if any one, from the time you left in May to go to Kansas and came back? A. William Barnes and wife.

Q. Who were they working for? A. Working for me.

Q. Have you ever seen a boat rowed from one lake to the other across this land? A. I never did.

Q. Except in the channel south of your house? A. No, sir, I never did.

Re-Cross Examination by MR. DENT.

Q. Why was that jog made in that fence at your farm? A. To set my barn in. A dry spot of ground to set my barn on.

Q. Did you raise the place with a scraper or otherwise around the house? A. Never in the world. I never put any dirt around the house, except I had to make a dirt cellar, that was out the back side at the corner of the house. I dug down about a foot in the house where it would be cool, and then banked it up so that we had a nice outside cellar. I tried to get a cellar in the house, when I got down there I didn't get more than three or four feet before I struck water.

Q. The water was pretty low at that time wasn't it? A. No, sir, it was too high to suit me. It was higher than I thought it would be.

Q. There were some seasons when it was pretty low and others pretty high? A. Yes, sir, lower some seasons than others.

Q. While you were there, there were high and low seasons? A. I can tell you only as they come along. There was seasons after heavy rains that I had to drive through water to get down to South Chicago, not often.

Q. You spoke this morning of seeing lately, some part of the road that you made there? A. I did.

Q. Where was that part of it? A. That was down on what I call the widow Condit's place.

Q. How did you happen to see it? A. I saw grass had grown up just as that was when the turnpike was there.

Q. There is tall grass growing along there? A. Yes, sir, that appears to be taller than any of the rest.

Q. Does that grass cover the road? A. Yes, sir, they don't drive within ten rods of it now, ten or twelve, and some ways twenty.

Q. Then you had to go out into that tall grass to find the road? A. Yes, sir, I did.

Q. You had to find part of it? A. I found it where I went out on the upper end where the grass was higher. I didn't expect to find any road on that lower ground that was lower down there.

Q. That was much lower? A. Yes, sir, considerably lower.

Q. How much would you think as a matter of judgment, a foot or two? A. Oh not more than six or eight inches.

Q. I don't know as I understood you this morning about your being driven away by the winds and waves from out of Lake Michigan when you were making the outlet there? A. When the channel had got deep enough, the sand it fell like that from under my feet and my oxen too, and five minutes after that the channel was 100 feet wide. From the time I saw the first motion of the oxen I knew it was coming. I don't know as Barnes would have got out if he hadn't catched the nigh ox by the bow of the yoke.

Q. Did that make a permanent change in the water? A. Yes, sir, it fell 33 inches. It was 33 inches lower at the house than when I made that channel. The wind changed and blocked it up.

Q. How long did that water continue to run down in that way? A. It run down until the wind changed. My recollection is now it was very close to two days and two nights; it might have been a little more.

Q. When the water run down to 33 inches did it expose very much ground of the land around your house? A. Oh, yes, sir. My fence I had to cut down, on the west end was nowhere, no water fence at all.

Thursday. November 5th, 1891, 10 A. M., court met pursuant to adjournment.

THOMAS DONAHUE, called as a witness on behalf of defendants Cleveland and Jordan, was duly sworn, and testified as follows:

Direct Examination by MR. DOUTHART.

Q. What is your name? A. Thomas Donahue.
Q. Where do you live, Mr. Donahue? A. Hegewisch.
Q. What is your business? A. I am a brick mason by trade.
Q. Do you know Franklin A. Cleveland? A. Yes, sir.
Q. How long have you known him? A. About four years, I guess.
Q. I will ask you if you are acquainted with the property lying between Wolf and Hyde Lakes? A. Yes, sir.
Q. Do you know the part down there known as Cleveland's property? A. Yes, sir.
Q. When did you first become acquainted with that? A. At the time I leased it.
Q. When was that? A. In April, 1887.

* * * * *

Q. Were there any improvements upon the property at that time? A. Yes, sir, there was a house standing there and a family living in it.

* * * * *

Q. Was this land that you leased all enclosed with a fence, or fenced to the water? A. No, sir; it was enclosed by the railroad and the slip, and Wolf Lake on one side, and the railroad on the other, and the slip on the north end, and I put a fence on the south side myself.
Q. Did you know anything of this property before you leased it in April, 1887? No, sir.

* * * * *

Q. How long did you have possession under this lease? A. I kept possession for three years there.
Q. What did you use the property for? A. Pasture.

* * * * *

Cross-Examination by MR. DENT.

* * * * *

Q. Were you down there very much yourself? A. Oh, yes, I was there considerable when I had my cattle in there in the summer time.
Q. Did the water come up over part of this land? I am speaking of this land described in this paper, Cleveland's Exhibit A?
MR. DOUTHART: That is not cross-examination. I did not ask the witness anything about the water.
MR. DENT: I think I am entitled to show what possession there was, and how the property was situated. They have attempted to show how the property was situated.
THE COURT: I do not know how it bears on the possession.

MR. DOUTHART: I have not asked the witness one word about water.

THE COURT: Well, you have shown that he had a lease of this land, and used it for pasturing cattle. They want to show to what extent he could use it. It bears on the question somewhat of occupation. Let it go in subject to objection.

(Question read.)

A. In the dry part of the summer there was no water there at all.

MR. DENT: There was a dry part. Was there a wet part also? A. In a dry summer there would be no water there. If it was a wet summer, a wet spring, there was water over some of it. A portion of it was very miry.

Q. How near Mr. Cleveland's house did the water come? A. Oh, it was a very mucky, dirty place around the house there.

Q. How near to the house? A. Right close to the house, right under the house, where the house stood—behind it.

Q. Then the house was on a mucky, miry place, was it? A. Yes, sir, one side of the house. The other side of the house was pretty dry.

Q Which was the low side or the mucky side? A. The side next to the railroad.

Q. The west side? A. Yes, sir.

Q. Was there a shelving off of the land that way, falling down, lowering of the land on that side? A. Yes, sir, it was running down from the house back towards the railroad.

Q. And the water would come up pretty close then on the west to the house? A. Oh, the water would remain there for quite a while. Not of late years though.

THE COURT: At the time you occupied it? A. At the time I occupied it, yes sir.

MR. DENT: On the north how was it as to the land, also as to the water north of the house? A. There was a portion of the north that you could drive a team of horses in there over it, but down towards the railroad was swampy. Those big bull rushes used to grow there.

Q. How far north could you drive a team of horses, did you notice? You could drive them through the water perhaps, couldn't you? A. No sir; they would get mired down there in a portion of it. You could not drive them right down to the slip. There was one piece across there that was very miry.

Q. There was a shelving off of the land towards the north as well as towards the west, was there? A. Very little. The water used to lay there on portions of it. Mostly runs kind of level, raised a little.

Q. Did you notice the character of the grass both north and west, what kind of grass grew? A. Oh, on the south side the best pasture was. Up there the grass was very poor; coarse, sour grass used to grow there.

Q. The best pasture then was on the south part, was it, of this tract? A. Yes sir, that piece of Roys', and that other portion that Mr. Cleveland represented was on the south of the house.

Q. South of the house? A. That made the best pasture, yes, sir.

Q. How much was there south of the house of this Cleveland part? A. I could not say how much there was there. There must be about eighteen or twenty acres. It ran along the side of the Roys on the east, and on the west ran to the railroad, that piece I occupied.

Q. Then north of that eighteen or twenty acres the grass was quite poor, was it? A. Yes sir, it was sour grass.

Q. What was it called? A. Marshy.

Q. Marshy grass, growing tall and large. South of the slip or next to the slip, what was the character of the land? Was it marshy land? A. Well, yes, you couldn't call it anything else. Oh, cattle could walk in there if it was nice and dry, in the summer time. In the spring, early in the spring, they would sink down considerably.

Q. Sometimes in the spring they would sink down so it was almost dangerous wasn't it, for them to go there? A. No. It was not dangerous.

Q. There was water standing there, wasn't there. A. In some places, yes, sir.

Q. Extending over all the north part of this tract described in this paper? A. No, not over all of it?

Q. Over what part of it? A. Only a very little part that the water used to stand on.

Q. I speak of what was next to the slip. A. Next to the slip, no.

THE COURT: South and next to the slip?

MR. DENT: Yes, sir. A. I don't believe there was many places there where the water used to stand.

Q. But the water would come at times, would it not, over pretty much all of it? A. Not of late years, no.

Q. Have you noticed a change in that respect from one year to another? A. Yes, sir.

Q. What has the change been? A. The water got very low in that country.

Q. It got low all around, didn't it? A. Yes, sir.

Q. Not only in these lakes, but in other places. Is that so? A. Oh, I guess so. Out there it got low, anyhow.

Q. How was the season of 1887, as to whether it was high water or low water? A. Well, that I could not say. I think it was kind of a wet season that season. I know there was water there; the cattle could drink the most of the season in that Cleveland place there.

THE COURT: What? A. The cattle could find water without going to the lake.

Q. Where? At Cleveland's house? A. Close to Cleveland's house. There was one season it was very dry.

MR. DENT: Which season was that, do you remember? A. I believe it was the last season I had it.

Q. Did it seem to dry up from one season to another that you were on there? A. Yes, sir.

Q. It was rather better in 1888 than 1887, and in 1889 better still, as to being dry? A. Yes, sir; dryer.

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Re-direct Examination by MR. DOUTHART.

Q. You say you considered that you rented about 45 acres from Cleveland? Was that land that was above the water? A. Yes, sir; it was up all above the water. That is on the lease there, it was understood.

* * * * *

Q. Then you didn't pay for land that was covered by the water? A. No, sir.

Q. When was it you had high water? A. Well, that I could not say.

Q. What caused it? I don't mean the year, but what caused it in any year? A. Well, I don't know, but some years rain or snow melting, and the lakes get higher there. There is a rush of water comes down the river and falls into Wolf Lake.

Q. Then it is water that comes off of the land, is it? A. Yes, sir, that is it.

Q. Entirely so? A. Some years it is higher than others.

Q. Did you ever know of the water coming in from Lake Michigan and raising the lake? A. Oh, yes, it backs up from Lake Michigan and raises the lake whenever the wind is north.

* * * * *

THE COURT: When the wind was from the north, it ran from the Calumet river into Wolf Lake? A. Yes sir.

MR. DOUTHART: You speak of the water standing on that land. How much would be the quantity of water that you saw stand there? A. Maybe half an acre.

Q. How long would it stand there? A. In a dry summer it would all disappear.

Q. Were you there at the time the railroad company cut those pieces or those canals there? A. Yes, sir.

Q. Was there any difference after that? A. Oh, yes.

Q. It was dryer, was it? A. Yes, sir, that drained that whole country.

Q. So when they cut from the lakes into the Calumet river the water was lower after that, was it? A. Yes, sir, I think it was.

Q. Did you ever see any water standing on the land after that? A. Oh, yes, there was water standing there.

THE COURT: After the railroad was built?

MR. DOUTHART: Yes, sir. A. There was one place near Cleveland's house.

Q. This water that you saw stand on these forty acres you rented from Cleveland—did any quantity of water stand there to interfere with the pasturing of the land by the cattle? A. No, sir, not any.

Q. Just pools here and there? A. Yes, sir.

Q. You say that when the wind came from the north the water would flow up the Calumet river, it would back up the river. Now, when the wind would change from the south what would happen? A. The water would get very low in the river.

Q. It would flow back again, would it? A. Yes, sir.

Q. It was simply the action of the wind on the lake? A. Yes sir.

Q. That drove the water up there? A. Always does get higher with a north wind.

Q. Well, then, that water would only flow in from Lake Michigan when the wind was blowing from the north? A. Yes, sir.

Q. And it would stop running through when the wind stopped blowing from the lake? A. Yes, sir.

Q. Just went back and forth as the wind blew it? A. Yes, sir.

WILLIAM BARNES, a witness called on behalf of defendant Conrad N. Jordan, being first duly sworn, was examined in chief by Mr. Bennett and testified as follows:

Q. What is your name? A. William Barnes.

Q. You will please look at the paper now shown you, purporting to be a lease dated the 1st day of November, 1879, from John I. Bennett to William Barnes, covering a piece of about four and a half acres of property between Wolf and Hyde lakes, at the North end of the land between those lakes, and marked Jordan's Exhibit 18, and state if you know who executed it (handing paper to witness). A. Yes. I believe I signed that.

Q. State whether it was executed about its date? A. Well, I don't remember the date. I don't remember the date at all.

Q. Look more carefully over the lease and state to the court whether that is the lease you say you executed, as it was when you executed it? A. I remember living there, but the only thing I go by here is where I have signed my name; that is the only thing I know that by. I remember living there at that time.

Q. Do you know John I. Bennett's signature? A No, I don't.

Q. Do you remember seeing me sign it? A. I don't remember where it was signed, or anything about that part of it.

* * * * * *

Q. Do you recognize the tract on the map at the right half, the map marked "Cole, Alvord & Shield's" and that word "Dewitt" on it at the upper part?

* * * * *

A. I can see it from here plain.

* * * * *

MR. BENNETT: Q. Is that the place where the word "Dewitt" is? (indicating). A. I see it is right there (indicating).

* * * * *

Q. Do you know who lived in that house before you lived in there? A. Lady by the name of Condit.

Q. Alice A. Condit? A. I think that is the name.

Q. Had you been there when she was living there to know it of your own knowledge? A. Yes, sir.

THE COURT: Q. She lived there before you? A. She lived there before I did.

* * * * *

MR. BENNETT: Q. Have you any distinct recollection now of how soon after Mrs. Condit moved that you went in there? A. No, sir, I have not.

Q. Did you move there under this lease, Mr. Barnes? A. Yes, sir.

Q. Did you have a family? A. I had a wife.

Q. Was your wife related to Mr. Smale? A. Yes, sir.

Q. His daughter, wasn't she? A. Mr. Smale's daughter.

Q. J. G. Smale? A. Yes, sir.

Q. How long did you, or about how long, did you continue to live in that house after you moved in? A. Well, I lived there I think a year and a half, if I recollect right.

Q. That would bring it in 1881; was that in 1881, would you think, as near as you can recollect? A. Well, I don't know. It was, I think, in the spring, I think I moved away.

* * * * *

Q. Were you there in the house continuously from the time you went in until you moved away in May, 1881, as you think? A. Yes, sir.

Q. Where did you move to when you moved out of that house? A. I moved up above into what was called then the Field house.

Q. Solomon Field? A. Solomon Field.

Q. On Section 29? A. I don't know what section it was. In fact I have no recollection of it at all.

* * * * *

Q. Point out, please, the Field house. A. That would be right in here (indicating).

Q. Is Field's barn shown on it? A. The barn at the north of the house,

Q. Is Field's barn north of the house? A. Yes, sir.

Q. Is it shown there? A. Yes, sir, north of the house.

Q. Were the house and the barn both there at the time you moved there? A. Yes, sir.

Q. How near to the ditch was the Field house? A. Sir?

Q. How near to the ditch was the Field house between Wolf

Lake and Hyde Lake was the Field House located? A. I guess it was somewhere in the neighborhood of one hundred yards.

THE COURT: Q. North of the ditch? A. Yes, sir, north of the ditch.

* * * * *

MR. BENNETT: Q. Now, Mr. Barnes, which way did you generally go to the city of Chicago or to Colehour from the Field place? A. I generally drove down between the lakes.

Q. Which way, north or south? A. Right straight down, north.

* * * * *

Cross-Examination by MR. DENT.

Q. I understood you to say when you spoke about driving out by the Field house that you drove through the lake? A. I said I drove down between the lakes.

Q. You drove down between the lakes? A. Yes, sir; between the two lakes, between Hyde Lake and Wolf Lake.

Q. Which way did you drive? A. Right north, right down the ridge.

Q. Was that over the road Mr. Field had made? A. Yes, sir; part of it.

Q. Have you seen that road lately? A. No, I have not seen any of them places up there for I guess six years.

* * * * *

Q. Was there tall grass growing up near the road? A. Yes, there was hay growing there.

Q. What was the character of it? A. How is that?

Q. What was the character of the grass? A. It was marsh hay.

THE COURT: Q. In the road? A. No, along each side of it. Of course the road was beaten down, couldn't anything grow in that.

MR. DENT: Q. Did that extend out to the lake on either side? A. Which? This grass?

Q. Yes. A. Yes.

Q. There was a good long distance where there were no trees wasn't there? A. Yes, sir.

Q. Where that grass grew? A. Yes, sir.

Q. I was pretty low along there wasn't it? A. Well, yes, it was low ground—low ground all up through there pretty near except the ridge.

Q. How near did you see the water from the Field house?

Objected to. Objection overruled.

A. How near did you see the water, did you say?

Q. Yes. A. I guess I have seen it up on one side, on the Wolf Lake side, on the east side, I know I have seen it up within fifty yards of the house.

Q. How near the road as the road ran? A. The road ran down along the edge of the lake part of the way.

Q. Along the edge of what lake? Q. Of Wolf Lake part of the way.

Q. How near was the water to the road on the other side? A. Up close to it in some places.

Q. On the west side it was close? A. Yes, sir; on the west side of it.

Q. And on the east side how close was the water to the road? A. Hyde Lake was the nearest water there was to it, on the west side.

Q. How near was the water on the other side, on the Wolf Lake side? A. How near was the water on the Wolf Lake side?

Q. Yes. A. It came up close to the road in some places.

Q. The water came up close to the road on the west side in some places and on the east side in some places? A. On the east side, no.

Q. Didn't I understand you to say so? A. No, I guess not. Hyde Lake was on the east side.

Q. Was Hyde Lake on the east side? A. I got the two mixed up. It was Hyde Lake I had reference to.

Q. You mean to say the water came up pretty close to the road on the west side? A. On the Wolf Lake side.

Q. How was it on the other side? A. The water on the other side, the Hyde Lake was the nearest water there was to it.

Q. Hyde Lake was the nearest? A. Yes sir.

Q. Wolf Lake was pretty near in some places? A. In some places right up close to the road.

Q. There was a thin, narrow strip then along the road line between the water on either side in places? A. On the Wolf Lake side.

Q. Wasn't that so in different places? A. I guess it is. Some places there where there were low places where there was water stood there in the spring and fall all the time.

Q. On either side of the road? A. Yes sir.

Q. Did you notice any grading in that road? How the road was made? A. No, I don't remember whether there was any grading in it.

Q. Don't remember about that? A. I don't remember anything about that part of it.

Q. Did you observe whether there were seasons of high water and of low water? A. In the spring and fall the water was high there.

Q. The high water then covered a large part of that marshy space on either side of the road? A. Covered some of it, yes sir.

Objected to by Mr. Bennett.

THE COURT: They did not go into that.

MR. DENT: I can put the question in a more general form.

THE COURT: It seems to me it would bear a little on the question of occupancy.

MR. DENT: Q. What years do you remember now as to the water passing over the road?

Objected to.

A. Well, I have no recollection of the years at all, none whatever.

THE COURT: He did not testify that the water passed over the road any year.

MR. DENT: Of his passing over the road, his going on the road?

THE COURT: His own passing?

MR. DENT: Yes, sir.

THE COURT: Answer.

A. During the time I lived there I went back and forth very often.

Q. During what years were those? A. I don't remember what years those were.

Q. Don't remember whether it began in 1879 or 1880, or when? A. Well I think when I first went up there it was in 1880. Of course I have been up and down them ridges ever since. I have been out in that part of the country ever since I was a little bit of a kid because I was raised out there, travelled all over it after cattle.

Q. But while you were living there? I will confine your attention to that time? A. During the time I was living there I was up and down.

Q. Were there some years of high water and some years of low water? A. I take it just about the same all the time I was there. In the spring it was high, spring and fall. During the summer season it was low as a general thing.

Q. What caused the high water and the low water, do you know? A. Well, I suppose—

Objected to. Objection overruled.

A. I suppose it was freshets in the spring; snow and ice melting up there and rains, spring rains and fall rains.

* * * * *

Q. Did you do anything under this lease, Mr. Barnes, had you anything to do? A. Why, I worked for myself there, cut hay.

Q. Where? A. Fished and hunted.

Q. Where? A. On the Field place.

Q. On the Field place? A. Yes, sir; and some on the Rushmore place.

Q. You don't know when you did that? A. It was the first summer I lived there. I don't remember the second summer whether I cut any hay there or not. I don't think I did. The first summer I was there I know I cut hay.

Q. That was what kind of hay? A. Marsh hay, mostly; meadow grass; marsh hay.

Q. Spin grass? A. Yes, some spin grass.

Q. Wire grass? A. Yes, sir; some of it.

Q. How near did the water come to the Field house on the west, that is on the Hyde Lake side? A. On the Hyde Lake side?

Q. Yes. A. Well, in the spring the meadow out behind it was generally covered with water, that is two or three inches sometimes, sometimes more.

Q. There was one continuous sheet of water? A. In the spring, yes sir, in high water time.

Q. All along the Hyde Lake side? A. Yes, sir; in some places. Not all of the places though.

Q. Didn't it spread pretty much all over that marsh land? No, not all over it; probably half of it.

Q. What half of it? A. It was, of course, where the high ground was the water did not cover it. It is not level you know. There is some of it a good deal higher than others, some parts of it.

Q. Didn't it shelve off towards the permanent water? That is fall off a little in height? A. No, I think all along the edge of the shore, it is higher there than out in the center of it.

Q. What do you mean by that? A. Along the Hyde Lake side that is the way it used to be.

Q. You mean up near the house it is higher than it is— A. Well, where the house was, there were trees there, big elm trees.

Q. That was on the highest ground, wasn't it? A. Yes, the house, yes sir. That was about the highest of it.

THE COURT: Q. The Field house? A. The Field house.

MR. DENT: Q. In high water how near did the water come on the west, that is on the Hyde Lake side? A. How near did the water come on the Hyde Lake side?

Q. To the house? A. Probably twenty-five or thirty yards.

Q. You don't remember ever measuring it I suppose? A. No, I never measured it.

Q. It did come pretty near, didn't it? A. Well, within twenty-five to thirty yards; might be a little more or less. I never measured it. I don't know really.

Q. Almost circled the house, didn't it? A. No, it was all out the other way, except that channel. Of course the channel was always there.

Q. What do you mean by channel? A. A channel ran from Wolf Lake to Hyde Lake.

Q. Where was that? A. That was south of the house.

Q. You mean about where the ditch is now? A. What do you say?

Q. You mean about where the ditch is now? A. Yes.

Q. Who made that ditch, do you know? A. I don't know. It was always there, ever since I can remember.

Q. Was it originally a broad channel? A. No, I guess it was about thirty feet across it, the widest part.

WILLIAM BUSH, a witness called on behalf of defendant Conrad N. Jordan, being first duly sworn, was examined in chief by Mr. Bennett and testified as follows:

Q. What is your name? A. William Bush.

Q. Where do you live Mr. Bush? A. I live on a piece of ground or land known as Field's place.

Q. Can you point out on the map the location of the house where you lived? I mean the map made by Cole, Alvord & Shields, at the right (indicating)? A. (Witness goes to said map). There is where I live (indicating).

Q. What is that building north, right north of the house? north of it? A. That is a barn.

MR. DENT: You have his deposition.

MR. BENNETT: I don't propose to read his deposition.

* * * * *

THE COURT: You don't propose to read his deposition?

MR. BENNETT: No.

Q. Look at the paper now shown you, marked "Defendant Jordan's Exhibit 29" purporting to be a lease executed by C. N. Jordan by John I. Bennett, his agent, and by William Bush, and state if you know of its execution (handing paper to witness)? A. Yes, sir.

Q. Did you see that executed? A. Yes, sir.

Q. Who executed it, who signed it? A. Why, Mr. John I. Bennett and William Bush.

Q. Is that you? A. Yes, sir.

Q. It bears date the first day of June 1888? A. Yes, sir.

Q. Was it executed at or about its date? A. Well, I think it was on the 8th of June 1888.

Q. The 8th? A. I think it was the 8th.

Q. Do you know who lived in the Field house prior to the time you went there? A. A man by the name of Chandler.

Q. What is his first name? A. Mr. Frank Chandler.

* * * * * *

Q. What if any cultivation have you made of the ground there? A. Well I cultivated all I could.

Q. Describe the amount and location of what you have cultivated? A. Cultivated, about, I should judge, about four acres of it.

Q. Where located with respect to the house? A. On the east side of the house, east and south of the house and a piece on the north of it.

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Mr. Dent here read the cross-examination of the witness by Mr. Swett, the same being as follows:

Deposition of William Bush,

on behalf of Conrad N. Jordan, taken before Julius W. Dyren-

forth, a Notary Public, in the City of Chicago, April 23rd and 24th, 1889:

MR. SWETT: Q. When did you first commence to go down there? A. Do you mean to hunt?

Q. Yes. A. About in 1886 or 1887, somewhere along there.

Q. Have you seen that section at all times, in high and low water, that country down there? A. Yes, sir.

Q. It is low water now, is it not? A. Yes, sir.

Q. When you first commenced to testify you stated that you thought your house was about one hundred and twenty-five feet from the club house? A. No, sir; one hundred and fifty feet.

Q. You did later. What is the distance, as near as you can tell? A. As near as I can judge it is one hundred and fifty feet.

Q. Is there a railroad on the west of the house where you live? A. Yes, sir.

Q. How near to the railroad are you? A. About three hundred feet from the railroad.

Q. The railroad runs along the shore of what is called Hyde Lake, doesn't it? A Yes, sir.

Q. With water as low as it is now, which you say is very low, that strip across there is about four hundred and fifty feet wide, you think? Between the two bodies of water? A. Yes, sir.

Q. Well, now, is it pretty nearly uniform width, as you go north, the strip of land? A. Yes, sir.

Q. You have seen it at all stages of water? A. Yes, sir.

Q. It is sometimes wider than at others. About how wide would that strip be in high water?

Objected to. This question and all other questions and answers on th e same subject are not cross examination, but new matter called out by counsel, and will be regarded as evidence on the part of defendant Hardin and Shedd if pursued.

A. In high water there would be no strip there at all.

Q. It would be practically covered with water? A. Pretty near.

Q. The water would come close to your house? A. Yes, sir.

Q. North of your house in the marshy or swampy places it would be covered with water, practically? A. Yes, sir.

Q. The water would go from one lake to the other?

The question is objected to as leading, being the evidence on behalf of the party asking questions.

A. Well, in some places it would. I have seen it cover that whole flat with water.

Q. North of the Field house? A. Yes, sir.

Q. Did that water extend pretty well up to the timber just south of the Condit house? A. Yes, right up to the timber.

Q. Did you ever go through there with a boat? A. Yes, sir; I did.

Q. Did you go through there many times with a boat? A. No, sir; I have not.

Q. You could get across there easily in times of high water? A. Yes, sir.

Q. At almost any point between your house and the timber? A. Not every point; but a good many places you could get through.

Q. Pretty generally you could get through there with a boat? A. Yes, sir.

Q. Could you row through with a boat, or did you pole it or shove it? A. Pole it.

Q. How deep would the water be? A. In some places a foot deep. On Wolf Lake shore it would be pretty hard. It is quite a little high ridge, you would have to pole a boat over that. Some places.

Q. That ridge was narrow? A. Yes, sir.

Q. Are there any trees north of your house, between your house and the McDaid ridge? A. There are a couple between my barn, that is all.

Q. Do you know where the Reese Point is, south of your house? Where Charles Reese used to live? A. I don't know where he used to live.

Q. You know south of your house there is a low place and then further south a point, a ridge, don't you? A. It is not on our ridge, the ridge I live on.

Q. How is the land between your house, the Field house and the channel which has been cut there? A. It is not much higher than it is north, except on the Wolf Lake shore, in towards the East there, it is not covered with water.

Q. On the east shore? A. On the east shore.

Q. Does the water come to your house? A. I have seen it once covered.

Q. I want the cut and the ridge down from there south where the trees are? What is the condition of the ground there? A. Well, on the west shore of Wolf Lake it is good high ground. There is a little on the railroad track, on the shore.

Q. Does that overflow on the east shore? A. No, sir; that is higher than on the north of the cut.

Q. Isn't there a low space, Mr. Bush, south of the ditch between there and the main point of land on the south? A. There is a low place; but not as low as on the north.

Q. In high water doesn't it flow it over. A. I have not seen it come up as high as that. It is a sort of a cut; but not low.

Q. Do you know about the depth of the water in Wolf Lake? A. No; I do not.

Q. You have been on the water in the lake? A. Yes, sir.

Q. Didn't you ever put your oar down? A. I never noticed the depth of the water.

Q. How is the water in Hyde Lake? A. It varies.

Q. Now how is it? A. I think you could cross Hyde Lake all over, except you got in a mud hole.

Q. On foot? A. Yes, sir.

Q. The water there is low now? A. Yes, sir.

Q. With a pair of rubber boots you could wade all through it? A. Yes, sir; except you got in a hole.

Q. Do you know the depression of the ridge, sort of a natural cut, just south of Mr. Smale's house, through which the water would run in high water? A. No, sir.

Q. You are not familiar with that locality? A. No.

Q. Then, Mr. Bush, looking north from your house, at the time of high water, the appearance would be like one general lake, extending across Hyde and Wolf Lakes, except being hidden by grass? A. Yes, sir.

Objected to as leading.

Q. Would the water come up so as to cover all the ground except the ridge itself?

Same objection.

Q. I mean the north ridge, where the timber is at Smale's house? A. I don't know anything about that.

Q. You know there are some trees by Smale's house? A. I don't know anything about that.

Q. You can see them from your house? A. South of those trees I can.

Q. Would the water come up, except showing the ridge, and make a pond? A. Yes, sir; pretty near.

Q. Now, you have testified that the water comes up to the south point of this ridge, that is where you can see it from your house; I will ask you if you can also see the south and west sides of this ridge, as it comes to a point from your house, and if so, if the water comes up on the east and west sides, pretty well up on the ridge? A. The ridge that the house is built on do you mean?

Q. I mean the ridge where the trees are, north of your house, where Smale lives. Now you have stated that between your house and that ridge, it is in high water, covered with water; would it at the same time, come up on the east and west side, and leave the ridge just out of the water?

Objected to as leading.

A. I think it would.

Q. What is your best recollection? A. I have never seen that in high water. I never went up there.

Q. From what you know of the land there, you think it would come up there?

Objected to as calling for a conclusion and not a fact.

A. Yes, sir.

Q. You came here at Mr. Bennett's request, Mr. Bush, to testify? A. Yes, sir.

Q. You were not subpœnaed? A. No, sir.

Q. Who asked you to come here? A. Mr. Bennett.

Q. Did you talk over with Mr. Bennett what he wished you to testify to for him? A. No, sir.

Q. You came to accommodate Mr. Bennett, and to prove those leases? A. That is all. To prove the leases.

Re-direct by MR. BENNETT.

Q. Have the Garden City Gun and Pleasure Club had any furniture or property in their club house since they have been down there, what have they had in their club house? A. Each member has a boat and fishing tackle and hunting clothes and we have got some chairs, stove and table.

Q. Have they been there all the time? A. Yes, sir; they have.

Q. Has anyone had charge of the club house for them? A. Yes, sir; someone has always had charge of it.

Q. In the way of cross-examination of the new matter brought out by counsel for Hardin and Shedd, I will ask you, Mr. Bush, to state how far timber north of the Field place, which he referred to, is, what timber he referred to in the answer? A. From the house?

Q. Yes? A. Well, I should from seven to eight hundred feet.

Q. Was that the first timber north? A. North of the house.

Q. You referred to in your answer to counsel on the other side? A. Yes, sir.

Q. Do you know what name they call that place where the timber is. A. No, sir; I do not.

Q. Have you ever heard it called the McDaid place?

Objected to as leading.

A. No, sir.

Q. Can you see north of that timber so as to tell whether there is water on the ground or not, standing at the Field place? A. No, sir, I cannot.

Q. In any of the answers which you have made with respect to there being water north of that timber, have you intended to be understood to refer to the timber at Smale's or this first timber? A. I refer to the timber close to the house.

Q. Now, when, Mr. Bush, did you first go down there? A. I think it was in 1886.

Q. Was the railroad there when you went there? A. No, sir. There was no railroad there, that was the same year they laid the track.

Q. Was the canal then cut through? A. Yes, sir.

Q. The club referred to was there? A. Yes, sir.

Q. Now, had you ever been there before? A. No, sir.

Q. Then you have only known that place since the club house was built, that was in 1885.

Q. You have been down there since 1885? A. I have been by the Hegewisch, but I have never rowed down through the slip.

Q. What year was this high water you speak of? A. I don't

remember what year it was. If I am not mistaken I think it was in 1886, or 1887, the highest water I have seen there; it was within an inch and a half of getting into the house.

Q. When was that? A. It was in the spring of the year.

Q. What year was it? A. I don't remember what year it was.

Q. Was it in 1888? A. No, sir.

Q. Was it in 1887? A. I think it was in 1887, because Chandler was living in the house at that time.

Q. In what particular locality do you say a boat could be poled with reference to the Field place? A. That was between the barn and the first timber north of the barn.

Q. Do I understand you to say that a boat could be taken in from Wolf Lake in there? A. Yes, and yes from Hyde Lake.

Q. In 1887? A. Yes, I think it was 1887.

Q. The railroad was there then? A. I do not remember whether there was a railroad there at that time or not.

Q. Was the railroad there at the time you refer to? A. That is a thing I don't remember.

Q. What do you mean? Do you mean that you were in a boat or that you poled a boat through the grass? A No; the railroad was not there. I poled the boat through.

Q. You simply poled the boat through? You were not in the boat? A. But I think a man could get in a boat and row right across.

Q. Why didn't you? You did not, did you? A. No, sir, I did not. I had no occasion to row over. It can be done. A man could get in a boat and row over there.

Q. Fix that what year was it? Was it before or after the railroad was built. A. It was, I think the high water I had reference to was at the time Mr. Chandler was moving in the house. At the time of that high water; and he had to have a boat to get in or out of the house.

Q. Was that the way he would get in the house from the barn? A. No, sir; he would go right in front of the house and the club, but could not get in or out.

Q. At the place where you were with the boat? A. I was shooting right north of the barn; I could get in and row all over. Mr. Fogli lived in the house at that time and I was there at the time Chandler lived there, and he had high water at that time.

Q. You did not go into Hyde Lake at that time, you were shooting? A. Yes, sir; I poled the boat over because there was a little high ridge on the east shore of Hyde Lake.

Q. And you had to pole the boat over? A. It might have been ten or twenty feet wide.

Q. Are you positive now whether the railroad was there then or not? A. No, sir; the railroad was not there at that time?

Q. Have you talked with counsel on the other side about testifying in this case? A. No, sir.

Q. Have you talked with Mr. Shedd? A. No, sir.
Q. Or with Mr. Hardin? A. No, sir.
Q. Or with Mr. Mitchell? A. No, sir. I never seen the man before.
Q. Did you ever see any of these good looking gentlemen before? A. Yes, sir. I think I seen that gentleman before (pointing to Mr. Swett).
Q. Where did you see Mr. Swett? A. He is the man, I think, that served the first paper on me at the club house.
MR. SWETT: That must be a case of mistaken identity, as I was never there in my life.
MR. SWETT: Q. How high is the floor of the house you live in above the ground? A. I should judge about eight inches.
Q. So that when the water was up within an inch and a half of the door the ridge was covered with water?
Objected to as argumentative.
A. It was not built on the ridge.
Q. Are there large trees and stumps about where the house is? A. Yes.

FRANKLIN A. CLEVELAND called as a witness on his own behalf, was duly sworn, and testified as follows:

Direct Examination by MR. DOUTHART.

Q. What is your name? A. Franklin A. Cleveland.
Q. Where do you live? A. Norwood Park.
Q. What is your business? A. Real estate.
Q. You are one of the defendants to the petition in this suit of Hardin? A. Yes ,sir.
Q. You are also the complainant in the cross petition? A. Yes, sir.
Q. I will ask you if you know the property in question in this suit? A. I do.
Q. Now, you can state what you first had to do with it? A. I first learned that there was an omission in the original survey of land, and I immediately took steps to enter it by instructions from the land department.
Q. When did you take steps to enter it? A. My impression is it was about the 1st of June, 1874.
* * * * *
A. Here was my house right in here (indicating), about fifty feet inside the meander line on 31. My barn was on 30, and my house was on 31. * * *
Q. How long did you live there, Mr. Cleveland, with your family? A. I think it was about two years at that time, 1874 and 1875.
* * * * *
Q. Did you ever go back to live there? A. Yes sir.
Q. When? A. 1887.
* * * * *

Q. How long did you live there after going there in 1877? A. Lived that year and the next.

Q. That would bring you down to 1878? A. 1878. 1877 and 8.

* * * * *

MR. DOUTHART: Mr. Cleveland, at the time you lived upon that land, you can describe the condition of it, as to water, etc. A. There was some years that almost the entire area of my present claim, 19 and 28/100 acres, was entirely out of water, and then high water would form pools around through the land.

Q, To what extent did those pools extend? How large would they be? A. Well, I should say in extreme high water there would be five or six acres covered with water.

Q. Out of the— A. Out of the 19 acres.

Q. How deep would that water be in those pools? A. Oh, from six inches to a foot.

Q. Where there was swags in the land? A. Yes sir.

Q. Would that water come in from the lake? A. Come in from the lake.

Q. At what time in the year would you have high water? A. Usually in the spring.

Q. At the time of freshets from snow and rain? A. Yes sir, snow going off, and rains.

Q: Did you ever see high water there in the middle of the summer, August and July? A. No, I don't think I ever did.

* * * * *

Cross-Examination by MR. DENT.

Q. You knew about the time of the commencement of the ejectment suits by Mrs. Hardin, did you not, Mr. Cleveland? A. You mean 1888?

Q. No, the ejectment suits that were begun in 1882? A. I knew of the commencement, yes, sir.

Q. Mr. Cash was your tenant at that time, wasn't he? A. I think he was.

Q. Mr. Thomas Cash? A. Yes sir.

* * * * *

Q. How far into the lake did you extend those fences on either side? A. On the south I did not go to the lake. I simply connected with what was known as Mrs. Reece's north and south fence, down in section 31. On the north that ran just to the lake, because it was soft ground, and the cattle could not get around it.

Q. The fence on the south was on section 31, as I understood you? A. 31, yes, sir.

Q. And then running northeasterly you ran it to Wolf Lake? A. No; I ran to the section line northeasterly, then on the section line north.

Q. Intending to run how near the meander line, if that had anything to do with it? A. Exactly on the meander line.

Q. Running out towards Wolf Lake, you intended to follow, or thought you did follow the meander line? A. Yes, sir.

Q. You did not know the meander line yourself, did you? A. Well, I think I did. I thought I did.

Q. Did you assist Mr. Wolcott in surveying it? A. I did.

Q. You were one of the chain men? A. One of the chain men, yes sir.

Q. Was not that, however, Mr. Cleveland, a survey by Mr. Wolcott of lines across the lakes in 1874? A. In 1874 we ran meander lines as well.

MR. DOUTHART: That is, you ran over the old meander lines? A. The old meander lines, I mean.

MR. DENT: What do you call the meander lines? A. I mean the present meander line established as I understood it by the Government in 1834.

Q. 1834? A. Yes sir, whatever it is.

Q. Running by courses and distances? A. Yes, sir.

Q. That was done by Mr. Wolcott? A. Yes, sir.

Q. In point of fact, however, didn't Mr. Wolcott merely extend the lines from corners that were found by him across the lake north and south and east and west? Isn't that what he did? A. I understand by extending that he located them.

Q. Located them? A. Yes, sir; located the lines.

Q. He found certain corners? A. Yes, sir.

Q. And extended lines across the lake either way, north and south, east and west? A. Yes, sir.

Q. And you were one of the chain men at that time? A. Yes, sir.

Q. Was Peter Munhoffen one of the chain men at the same time? A. Yes, sir.

Q. Was Mr. Rushmore one of the chain men, or assistants? A. He was along. I don't think he carried a chain.

Q. Chester B. Rushmore, was it? A. Chester B. Rushmore; yes, sir.

Q. Was Mr. Smale one who was assisting at that time? A. I think he was there part of the time.

Q. You bore part of the expense, did you not, of that survey? A. I believe I did, part of the expense of the survey.

Q. Who made up the expenses, do you remember?

MR. DOUTHART: That is not cross-examination.

THE COURT: No, that is not cross-examination.

MR. DENT: I will make him my own witness for the purpose merely of seeing what the fact is.

Last question read.

MR. DOUTHART: I object to it now, because it is irrelevant.

Objection overruled.

A. I don't know.

MR. DENT: Don't you know who assisted you in paying for the

expense of that survey? A. I know that my lawyer assisted me and I didn't have any further knowledge of it myself.

Q. Well, don't you know that Mr. Rushmore and Mrs. Condit, and Mr. McDaid and Mr. Eield bore the expense of that survey with you; that you made up the amount, the cost of the survey, and had it paid over to Mr. Wolcott?

THE COURT: Of your own knowledge? A. I don't know of my own knowledge.

MR. DENT: Didn't you so arrange with your lawyer? A. I left it entirely with my lawyer.

Q. Didn't you so arrange with your lawyer your expense of that survey? A. Yes, sir, I arranged for mine.

Q. What was your proportion, do you remember? A. I don't remember now.

Q. You can remember about what it was, can't you, generally? A. My impression is it was about $100.

Q. That went to pay Mr. Wolcott, did it? A. Well, I understood it went to pay the expenses of the survey.

Q. What you wish to have treated as a government survey in 1874? A. Yes, sir; that is the way I understood.

Q. That is the survey to which you have been referring, is it not? A. Yes, sir.

Q. How did you get across the lakes in making that survey? A. Which lakes?

Q. Well, Hyde Lake and Wolf Lake. A. We walked.

Q. Which way? A. We walked on the State line, the line between Indiana and Illinois, from the boats at the south of Wolf Lake, entirely through Wolf Lake. I led off on the chain.

Q. You waded, didn't you? A. Waded, yes, sir.

Q. How deep was the water there? A. Well, it was just about as deep as we could wade in some places.

Q. How deep was the water where the corners were fixed on that line? A. I don't remember the field notes on that. I could not fix that in my mind.

Q. The water was pretty deep in some places, wasn't it, where the corners were fixed? A. My mind would not serve me on the depth of the water on the corner. I did not charge my mind with it.

Q. How about the east and west lines, as to the depth of water? A. The water in Wolf Lake, except a certain portion right in the center, was very easily waded. It would come boot high to waist high. There was one place it was up to the chin.

Q. How did you do when you came to a place that was up to the chin? Did you have a boat along? A. The boat was along, but I waded and kept off on the chain.

Q. You kept the boat along all the time, didn't you? A. Mr. Wolcott's assistant, I think, was in the boat, and Mr. Rushmore. Munhoffen and I were in the water, I think, the entire—I know I

was the entire length of the line through that lake; something like two miles, I guess it was.

Q. I asked you also about running east and west, as to the depth of the water. Do you remember about that? A. Well, we didn't find any difficutly in wading on the east and west line.

Q. Did you set any pins as you were going along? A. No, sir. On the lead of the chain I set the poles down as we came to the end or the chain, but as to putting in permanent pins, that was for the assistant following.

Q. Well, did the assistant following do anything of that sort, to your recollection? A. Yes, sir.

Q. Do you remember that he did? A. Yes sir, I remember seeing him do it.

Q. How could he do that? You would take the pole away, wouldn't you, to go on with the chain? A. No; he would follow at the end of the chain. He would let the pole remain until the chain reached the next link, and then he would take that point, and then stay there until we got to the next point.

Q. That is, he would hold the point down? A. Yes sir, he would hold the point down until we got to the next length of chain.

Q. The pin was not more than a foot long, was it? A. Well, we used poles.

Q. Instead of pins then you used poles? A. Where the water was more than a foot deep, yes, sir.

Q. You had to do that a great deal, didn't you? A. Well, in the deep water, of course.

Q. When you came to a corner what was done? A. Then it was held, and they put on a heavy stake; the point was held and they put down a heavy stake.

Q. What point was that? A. At the corners, and section corners, and half corners.

Q. You mean the forward end of the chain was held, the pole? A. Yes, sir; the pole at the forward end of the chain was held there until they had established a heavy stake there.

Q. That is, that would be a long pole, wouldn't it? A. Yes, sir?

Q. Several feet long? A. Well, it would go down pretty well into the muck and necessarily be—

Q. How long was it? A. Six or eight feet long.

Q. At least six or eight feet? A. Yes, sir.

Q. Sometimes longer, wasn't it? You had longer poles than that, didn't you? A. Well, I don't know. I don't think we did, any longer than eight feet. I don't think there was any longer than eight feet.

Q. Wasn't the muck pretty deep in some places so that the pole would not reach the bottom of it? A. Well, the mud was deep in Wolf Lake—in Hyde Lake—but in Wolf Lake it was sand bottom, largely.

Q. How did you manage to get through the deep mud in Hyde Lake? A. Well, the water was not so deep there.

Q. How deep was the water? A. I should say not to exceed two or two and a half feet in any point.

Q. That would be over the muck, would it, the depth of the water you are speaking of? A. The depth of the water as we walked.

Q. How deep was the muck there? A. Oh, you could put a pole down two or three feet, perhaps, but a man would not sink down into it very much.

Q. How did you manage to get through Hyde Lake, north and south, and east and west A. Walked.

Q. All of you? A. Yes, sir—no, only the chain men.

Q. The chain men were in the boat, were they? A. No, the chain men had to walk.

Q. Do you mean to say that you walked? A. Yes, sir.

Q. And who else? A. I don't remember whether Munhoven was on the chain at that time or not. I can't tell who was chaining through there.

Q. Did you undress yourself? A. No, sir.

Q. Take off your clothes in going through? A. No, sir.

Q. Have high boots, or how did you dress yourselves? A. We dressed in light summer clothing, and had an extra suit to put on as soon as we got through.

Q. How long were you engaged in making that survey? A. My impression is two or three weeks.

Q. Did the water change some while you were there? A. I don't remember that it changed materially.

Q. It was quite low, wasn't it? It was a season of low water? A. It was low then, yes, sir.

Q. Did you ever see it any lower? A. Yes, sir; it is lower now.

Q. It is lower now? A. Yes, sir; a great deal.

Q. It is extremely low now, isn't it? A. The lowest I ever saw it.

Recess to 2 o'clock P. M.

2 o'clock P. M. Court met pursuant to adjournment.

FRANKLIN A. CLEVELAND resumed:

MR. DENT: The claim you made was intended to be entirely within what you supposed to be the meander line, wasn't it?

MR. DOUTHART: I object. That appears in writing.

MR. DENT: I am asking Mr. Cleveland what land he intended to claim, whether it was entirely within the meander line.

THE COURT: He undertook to describe the tract he entered, didn't he?

MR. DENT: He has attempted to describe it.

Last question read.

A. Yes, sir.

Q. Then if you made a lease to Thomas Donahue, or gave him anything in the nature of a lease, did you intend by that lease to give him any right outside of the meander line, to Mr. Hardin's property, for instance? A. No, sir.

Q. Did you in fact put him in possession of anything outside of the meander line? A. No, sir.

THE COURT: Put who?

MR. DENT: Thomas Donahue.

Q. The water came up pretty close to your house sometimes, didn't it, Mr. Cleveland? A. I think it did once, within a few feet.

Q. On the west and on the north side, too? A. North-west corner.

Q. On both sides, both north and west, didn't it come up within a few feet of your place? A. No; the west was pretty good ground, immediately west of the house.

Q. Within how many feet did the water of the lake come to your house?

THE COURT: Do you mean the first house or the last one?

MR. DENT: I suppose the first house.

A. The first house you refer to is in 31.

Q. That is in section 31? A. Yes, sir; it came up within a few feet of it,

Q. Within how many feet? A. Oh, probably ten feet—five, perhaps—five or ten feet.

Q. When was that? A. I can't tell you the date.

Q. Was it 1874 or 1875? A. My impression is it was 1876.

Q. What makes you think it was 1876? A. Well, that is the impression I have on my mind. I would not swear to either date.

Q. Was the water higher in 1876 than it was in 1874? A. I could not say that.

Q. What is your recollection? A. It was higher at that time than it had been before, at the time that it came up there, but I have no particular means of fixing the year.

Q. Were there some years of high water and some years of low water? A. Yes, sir.

Q. Can you tell which they were, separate them, distinguish them? A. I cannot designate the years.

Q. Were you there much yourself in fact after 1874 or 1875? A. Yes, sir; I was there in 1876 and '7, or 1877 and 1878, considerable. I was away—that is, I would go away in the morning and come back at night.

Q. The water did come up within a few feet of your house on various occasions, didn't it? A. I don't remember of but one occasion when we had extreme high water.

Q. You have spoken, I believe, of all of your present claim, which is about 19 acres, as I understand, being covered by water at times, except five or six acres. Did I understand you rightly? A. No, I did not mean to be so understood.

Q. What do you mean to be understood? A. At extreme low water there was none of it covered.

Q. What did you mean to be understood about the five or six acres? A. At extreme high water; that there would be five or six acres, that is right.

Q. Extreme high water there would be five or six acres? A. Yes, sir.

Q. That would be— A. Entirely out of water all the time.

Q. Where was that five or six acres? A. There was three or four acres there in section 30 in two points. There was a grove at the north near the outlet, as we call it, quite a grove, that I never— I don't remember to have ever seen it under water—and another about half way; another piece of ground that we cultivated a good deal; raised turnips, etc.

Q. Those two pieces, you think, would make up three or four acres together? A. Five or six; yes, sir, with the garden spot at the house.

Q. Then I understand you now that there were three pieces on section 30 that were not covered by the high water, and they together made five or six acres; that one of the three pieces was up near the cut, the slip that has been made across between the two lakes? A. On the 30 and 31. The house was on 31, and there was a tract of some two or three acres there north of the house.

Q. That was a part of the five or six acres? A. Yes, sir.

Q. What was the separation, distance of separation, in those three pieces, one from the other? There was some low intervals of land, as I understand? A. The first was about twenty rods.

THE COURT: What do you mean by first? A. The first beyond the house on the north, and the most northern piece was about forty rods, I suppose.

Q. Forty rods north? A. North of the house; yes, sir.

MR. DENT: In the high water there would be sheets of water around those pieces of land that were unexposed? A. The water would flow over between them; yes, sir.

Q. Did the water come into your house sometimes? A. No, sir.

Q. In high water periods? A Never, to my knowledge.

Q. Had you raised the house up? A. No; it was set on posts as it was built.

Q. Didn't the water come under the house, though, where the posts were? A. Well, I don't remember that it did.

Q. Wasn't there water spread over the ground there? A. There might have been water under the house; I would not say positively as to that—in low spots.

Q. The house was on about the highest point, wasn't it? A. No.

Q. You selected about the highest point for the house? A. There was some higher points about the house that I could have selected.

Q. Where was that? Which direction was that in? A. That was between that and meander line, and to the westward.

Q. You mean east was a higher point? A. East and south.

Q. East and south? A. East and south.

Q. Well, the south would be in section 31, wouldn't it? A. Yes, sir.

Q. How close to the meander line was your house? A. Fifty or sixty feet, I should think.

Q. Then the higher point was fifty or sixty feet on the east and then over in section 31? A. Yes, sir.

Q. Was your house on an inclination downward? A. Yes, sir.

Q. From the meander line? A. The front of the house stood on higher ground than the rear.

Q. You mean the north part of the house was on higher ground than the rear? A. No, the west part of the house, the northwest part of the house.

Q. The ground sloped off then towards the west from the meander line down to your house a little? A. Northwest.

Q. Towards the northwest? A. Northwest, yes, sir.

Q. And sloped off from your house westward, too, did it? A. No, not westward, but northwest. There was quite a piece there around the house that was rarely wet.

Q. Sometimes wet? A. Sometimes wet, except at these points I speak of.

Q. What kind of grass was there there when you first went there? A. It was spin grass.

Q. That covered up that tract, didn't it? A. Pretty much, yes, sir.

* * * * *

Q. You left it to your lawyer, as I understood, to attend to this business for you? A. Yes, sir.

Q. Who was your lawyer? A. H. O. McDaid.

Q. Was Mr. Bennett your lawyer a part of the time—Mr. John I. Bennett. A. After Mr. McDaid died; yes, sir.

Q. When did Mr. Bennett become your lawyer? A. Well, I cannot tell you that.

Q. Pretty soon after you went on this property? A. I think he was associated with Mr. McDaid in the case.

Q. You have known Mr. Bennett a good while, I presume? A. Since about that time.

Q. Where did you cut hay yourself in 1874, Mr. Cleveland, or have it cut? A. To the north and northwest of the house.

Q. How near the house? A. We ran down about fifty rods, I suppose, forty or fifty rods near the lake.

Q. Which way did you run? A. Northwest from the house.

Q. Where did you cut hay in 1874? You remember these years now, do you?

THE COURT: That was Hyde Lake?

A. Hyde Lake, yes, sir. Well, over much the same tract. It was finer hay there, and more desirable.

MR. DENT: Did you notice the outlet to Hyde Lake on the west at any time, the outlet for water, or the inlet, whichever it may have been? A. Yes, sir; I had occasion to notice it. I tried to get a boat through there, and I could not, except in high water.

Q. How was that? A. I tried to get a boat through there, and I could not, except in high water.

THE COURT: You mean the outlet? A. The outlet into Calumet River from Hyde Lake.

MR. DENT: Q. Which way did you take your boat in going there? A. There was a house called Cönyvesy's, Joe Cönyvesy, who was just south of that outlet. In high water there was a connection between Hyde Lake and Calumet Lake, but it ran dry when the water went down.

THE COURT: Calumet River? A. Calumet River, I would say.

MR. DENT: When was it you went over and tried to run your boat through? A. Several times.

Q. In what years? A. I think it must have been 1875.

Q. Sometime afterwards too? A. Yes, sir; I presume.

Q. Different times? A. I used to go over there frequently, to go out that way by water.

Q. You kept a boat, didn't you? A. Yes, sir.

Q. Where was the boat kept usually? A. Kept in Wolf Lake.

Q. And you would take your boat? A. Through the outlet.

Q. Through the outlet over into Hyde Lake? A. Yes, sir.

Q. And then across Hyde Lake and go through to the other outlet on the west? A. Yes, sir.

Q. Didn't you in fact pole your boat through that outlet into the Calumet? A. I presume I did in high water.

Q. And you poled your boat, too, didn't you, between the two lakes? A. Yes, sir; through that cut.

Q. When was that cut made, do you know? A. I don't know.

Q. Did you have something to do with opening the mouth of Wolf River over there at Lake Michigan? A. Yes, sir; I was down there once.

Q. When was that? A. I cannot tell you now.

Q. Were you and Mr. Field down there together? A. No, sir. I think Mr. Field was not along when I was down there.

Q. Did you do something towards opening that outlet? A. Yes, sir.

Q. When was that? A. I can't tell you.

Q. Was it in 1874? A. I think it was later.

Q. What makes you think it was later? A. Because 1874 was a busy year with us. I did not have time to look around to it.

Q. Is that the reason why you think it was not 1874? A. It is my impression that I did not have time to look at it, and then it being late in the season, there would not be any particular occasion.

Q. How do you fix the dates now, Mr. Cleveland, of your as-

sisting Alexander Wolcott to make the survey? How have you fixed those dates? A. I don't know that I have fixed them.

Q. I thought you said you were engaged about two weeks? A. I know it was quite a time, but I said about two weeks, because that is my impression, that it was that length of time.

Q. How with reference to your building a house, commencing to build your house? Is the matter in your mind as to when the survey was made with reference to building your house? A. No; I had my house built—in fact, I built it in a very short time.

Q. Didn't take you more than a day or two to build it, did it? A. No.

Q. And was the survey made after that? A. Yes, sir.

Q. How soon after that? A. Well, I think right away.

Q. Had Mr. Wolcott been down there before to look over the matter and determine whether he could make the survey? A. I don't remember.

Q. You don't remember that? A. No.

Q. Did you go and visit him yourself to get him to come down? A. No, sir.

Q. Do you remember about that? A. I don't remember of visiting him at all—I don't remember of seeing him until he came down there to make the survey.

Q. In some years you had to go into the water to cut the grass that you cut, didn't you? A. Yes, sir; some portions of it.

Q. How deep water? A. I don't think we ever cut grass in water over five or six inches.

Q. Where was that? A. That was between the high grounds, down on the bottom, as we call it.

Q. That was west of your house? A. Northwest.

Q. Northwest of your house? A. Yes, sir. There was a depression there between that and the level ground near the lake.

Q. I ought to have asked you what success you had in opening Wolf River into Lake Michigan, what you did more particularly. You can state, please? A. Well, we succeeded in getting the water to run off, and the wind changed and filled up the channel immediately.

THE COURT: Q. What is that? A. The wind changed and filled the channel pretty soon after we had opened it.

MR. DENT: Q. How much did you lower the water? A. I did not take the datum of the water at that time.

Q. About how much would you suppose? Two or three feet for instance? A. No, I should think perhaps not more than 10 or 12 inches.

Q. Was that a permanent lowering of the water, or lowering for some time? A. Lowered for some time.

Q. How long a time would you suppose? A. Well, the next rains would fill the lake, being the sheddage of the tract.

Q. You don't remember how long it was lower at any time by the opening of Wolf River? A. No, sir.

* * * * *

Cross-Examination by Mr. Goudy.

Q. You have spoken of a grove that was out of water, in answer to a question by Mr. Dent. What kind of trees were they? A. They were white wood, or a sort of white poplar.

Q. Any other kind? A. I think there were some elms. There were some other kind of trees, but it was mainly a grove of poplars; about 50, I should think, in that grove.

Q. Were they of native growth? A. Yes, sir; I think so.

Q. How large were they? A. There were some of them six inches through. I transplanted quite a number of them to the front of my house and they done remarkably well. It took four horses to draw them.

Q. In 1874, when that survey was made by Wolcott, were there any trees north of you, running up to the north, the center line of section 20 on the ridge between the two lakes? A. Yes, sir; there was quite a heavy growth of oak right through here (indicating on map).

Q. Just tell where it is? It is east of the Reese place? A. Just east of my place on the bank of Wolf Lake in 29.

Q. What kind of trees were they? A. They were oak, scrub oak.

Q. How large? A. Some of them grew a foot or more.

Q. North of that? A. North of that, up here (indicating on the map), where this McDaid tract is marked, and there was quite a ridge partially across here, within about 10 rods of this railroad, and then it turned north here and grew quite heavy trees there.

Q. What kind of trees? A. I think there were elm and oak.

Q. How large were they? A. Well, there were some of them 10, 15 or 18 inches through.

Q. On the plat marked "Condit"? A. On the Condit tract there was quite a body of timber. I should say there was 30 or 40 acres there.

Q. What kind of trees? A. Those were the same sized trees.

Q. Do you mean oak and elm? A. Oak and elm.

Q. And how large were the trees? A. Those were large, too; a foot to 15 or 18 inches.

Q. Did you ever know of any trees growing in the submerged land down there in the lakes? A. No, sir; I don't think I ever did.

Q. Well, do you know whether that kind of timber would grow in water or not? A. I should think not.

Mr. Dent: Q. You spoke of there being some trees on the McDaid tract, pointing pretty well to the north line of the tract as represented on that map of 1891, pointing pretty well to the north line of the McDaid tract. I understood you to say they were irregular? A. Yes sir. There was a narrow belt of trees, I should think it

was, three or four rods wide, perhaps, scattering trees that ran east and west and then made a sharp turn to the north.

Q. Sort of semi-circle? A. Well, it was more of an L, but it was about, I guess, 10 or 15 rods from that north line

* * * * *

Here is 30, in the center, the center of the quarter you might say. McDaid's house was right in this timber about 10 rods, I should say, from the south line of his claim.

MR. DENT: Q. Then the trees you speak of were here? (indicating). A. Yes, sir.

Q. North and south of those trees there was an interval of low land where grass grew, wasn't there, this tall grass you have been speaking of? A. Yes, sir; to the north and east of the L and to the south from lake to lake.

Q. Extending over from lake to lake? A. Yes, sir.

Q. And extending south how far from that point of timber? A. Well, it was pretty uniform to Field's place.

Q. A good many rods, wasn't it? A. Well, that would indicate 40 rods, wouldn't it?

Q. What was the distance, if you ever noticed it, north from that irregular grove of trees to the next grove of trees? A. That was connected pretty well. This L connected the two tracts of trees together.

Q. But I understood you to say there was a low space? A. There was a low space inside of the L east.

Q. On the north—wasn't there a low space too? A. No, I think that is continuous.

Q. Haven't you seen that that is a very low, boggy place along there between those points? A. North of McDaid's?

Q. Yes, sir. A. No.

Q. Don't you remember there is a low space along here? (indicating). A. As I say, to the east—

Q. Two main points that ran down this way, the tract marked "DeWitt," one this way and the other that way? (indicating). A. This range of trees and timber connected with the Condit range of a good many acres of timber.

Q. I am asking you now if there was not an interval of low space where trees did not grow, between this point on the ridge where my pencil is, and that point there, an interval of low ground where this tall grass would not grow, where it was mucky and marshy? A. No, the ridge, I think, is continuous through to the east and a little to the west of the north end of the L, it is low, flat ground.

Q. If it would be shown otherwise by persons who have examined the land, you would admit you were mistaken, wouldn't you? A. I give my impression.

Q. It is not anything but impression, is it? A. Well, I think I know pretty well. I ought to. Then, of course, I have not paid so much attention to that.

Q. That ridge is a very narrow ridge, isn't it? A. Yes, sir.
Q. A mere thread in places? A. No, a rod or two wide.
Q. And irregular, not running on my lines as to the compass? A. No.
Q. Isn't it rather deceptive when you look at it from the south? Doesn't it look wider than it really is? A. I never thought of that.
Q. The north front of the ridge, I mean. Isn't it so shaped that it looks much wider when you come to it than it in point of fact is? A. Going to it from the south?
Q. Yes, going to it from the south? A. Yes, that would naturally be.
MR. DOUTHART: Were there any trees growing on that tract of land? A. Yes, sir.
Q. How many? There were two trees in front of where I built my house, on the east side. One was a mountain ash and the other was an oak.
Q. How large? A. Oh, they were probably twenty feet high, or such a matter.
Q. How large were they through, in diameter? A. Oh, three or four or five inches.
Q. Were there any other trees down that way? A. No, sir; only what I set out, I guess, on that tract, except this grove that I spoke of, on the upper end.
Q. Were there any down in 31? A. Yes, sir; there were some on the south-east part of 31. It ran into the timber considerably there.
Q. How large were the trees down there? A. South-west part, I should say.
Q. How large were the trees down there? A. Oh, they were six or eight inches through.
Q. What kind of trees? A. Mostly oak.
MR. DENT: Where were those trees that you spoke of being near your house? A. They were in front.
Q. Which way? A. To the east.
Q. They were east of the meander line, then, were they not? A. No, sir; no; they were right close to the house.
Q. How could they be between your house and the meander line, when your house was fifty or 100 feet only from the meander line? A. Well, they were about not to exceed ten feet from the house.
Q. You built right under those trees, then, didn't you? A. They made a shade for my door.
Q. Did they grow close together? A. Yes, sir; well, they were a little ways apart, like that, (indicating).
Q. How far? A. Within ten feet of the house. I don't think it was ten feet. They were close by, and I had a well right there.
Q. Was either of them north of the section line of section 31? A. No, sir.

Q. They were both in section 31? A. Both in section 31.

MR. GREGORY: Don't you remember that a little north of the north line of section 29 there is a kind of natural depression through this ridge? A. I know there is a natural depression there, but I don't think it is through the ridge.

Q. What do you mean? A. I mean there is a depression there, but the ridge takes east of that depression there, and west of this depression here, (indicating).

Q. Now, this map purports to show—the white ground is the highest, and this is the dampest, the dark, near the water. Now, see if there is not in the lake indicated a kind of a depression through there near the southwest corner of 20, and near the north line of 29. Now, is your recollection that that does not exist? A. My recollection is that this ridge and this timber continues until you strike that high ridge, but the ground is lower in there, (indicating).

Q. The ground is lower in one point, but you think it is timbered? A. It is timbered.

MR DOUTHART: That spin grass that you spoke of, does it grow where the water is all the while? A. No, sir.

THE COURT: He answered that timber did not grow in submerged land.

MR. DOUTHART: This is spin grass I am asking about.

Q. Does it grow in the submerged land? A. No, sir.

Q. Never found it? A. No, sir. Land that is only periodically submerged, and then comes out of the water, grows spin grass, but land that is habitually under water does not grow spin grass.

Q. Will the spin grass grow on land that is never submerged? A. Well, it is wild grass. I suppose it would grow anywhere most that it got rooted.

FRANK SCHOLES, called as a witness on behalf of the South Chicago and Southern Railroad Company, was duly sworn, and testified as follows:

Direct Examination by MR. LOESCH.

Q. Give your full name, age, residence and occupation? A. Frank Scholes, Auburn, Indiana.

Q. What is your occupation? A. Civil engineer.

Q. Were you in 1886 in the employ of the Pennsylvania Company? A. Yes, sir.

Q. Did you have the superintendency of the South Chicago and Southern Railroad Company? A. I did.

Q. Was the South Chicago and Southern Railroad constructed under your superintendency through sections 20, 29 and 30, 37, 15, on the map? Show on the maps? A. I cannot see the map plain enough, but all the parts shown on the map were constructed under my superintendency.

Q. Please state when it was constructed through those sections specified more particularly the south half of 20, and section 29,

and the north half of section 30? A. The railroad work proper, the bed of the railroad was constructed during August, September, October and November.

Q. What was the first work you did down there, and when? A. On this plat of land?

Q. Yes, on that land. A. It was having the channel dug across Hyde Lake, marked on the map as "Artificial channel."

Q. When did you first make your survey for that road? A. In May.

Q. May, what year? A. 1886.

Q. Do you remember the date? A. I commenced at the Pittsburgh, Fort Wayne & Chicago Railroad on May 7th. I could not tell the exact days that I ran the line.

Q. And then surveyed down through this part? A. Yes, sir; and finally located a correct line.

Q. When did the dredge commence to do this work, throwing up the dirt for that track? A. In the fore part of August.

Q. Any work done in July? A. Only digging the channel across the lake to get into the railroad work. They had to deepen the lake throughout.

Q. That is, from Calumet River in to Hyde Lake? A. From Calumet River across Hyde Lake to the railroad embankment they had to deepen it, nearly all of the way. That was done, nearly all of it, in July.

Q. Then work was commenced on throwing up the grading early in August, you think? A. Early in August.

Q. And the work was completed when, the entire road? A. I finished laying the track the fore part of December.

Q. Of 1886? A. 1886, but I cannot give the exact date. I think we ran the first trains over it to carry passengers on the 16th of December, and that was just a few days after it was completed.

Cross-Examination by MR. BENNETT.

Q. What time was the slip dredged through between the two lakes? A. I would not be positive of the month, but I think in September.

Q. 1886? A. Yes, sir; latter part of September, 1886.

Q. What was the purpose of dredging that, do you know? A. Of dredging?

Q. Why did the railroad company do it? A. I don't know why they did it. I got orders from Mr. Slatterper to do it, and obeyed orders.

Cross-Examination by MR. GREGORY.

Q. You must have, of course, some memorandum showing when you did that work, something to verify your recollection? A. My field books of the entire work were left with Mr. Whitney.

Q. Who is Mr. Whitney? A. The engineer or assistant engineer of the Pennsylvania Company, located here. I called at

the office this morning, but they were all out, and where my field books are I don't know.

Q. Have you any memorandum or data from which you fix the year and the month in which you did this work? A. I fixed the months more particularly by looking over the contractors' time books this morning.

Q. So that you are quite confident that that work was done in the year 1886? A. I was confident of the years before, and months also, from my own memory, but I fixed the months more especially from the contractors' time books this morning.

Q. You think the entire work was done and the road bed ironed and trains run to carry passengers before the 1st of January, 1887? A. Yes, sir.

Cross-Examination by MR. DENT.

Q. Did you see the dredge working there? A. I had entire charge of it during the whole time it worked there.

Q. Where was the dredge taken from? A. I don't know as I understand your question.

Q. Where did you enter Hyde Lake with the dredge? A. I will point it out to you on the map. Mr. Davis, of the Chicago Dredging and Dock Company, started one dredge there, (indicating on map), and Mr. Dodge dredged to this point, (indicating on map).

Q. How did you get the dredge into Hyde Lake, and from what point? A. From Calumet River by digging across that channel, or digging across that high ground.

Q. Did you in point of fact dredge from Calumet River down to Hyde Lake? A. Yes, sir—no, this part (indicating) was dredged before I had anything to do with it.

THE COURT: What part is that? A. That is the part from Calumet River to a point south of the southwest of the center of section 30. That elbow was dredged before I had anything to do with it. I don't know when it was dredged.

MR. DENT: You took the dredge down from Calumet through that channel that was already dug? A. Yes sir.

Q. On to Section 30, and then dredged easterly in Hyde Lake, and after you entered Hyde Lake which way did you dredge? A. I put one dredge to work there dredging northeast along the line of railroad track, and the other dredged at this point (indicating), and dredged north.

Q. You ran one dredge through Hyde Lake? A. Yes, sir; along the western side.

Q. How much water did the dredges draw, about how much? A. I think the Chicago Dredging and Dock Company's dredge drew about five feet. Mr. Dodge's dredge was easterly, and drew about four feet of water.

Q. Where did Mr. Dodge's dredge work? A. At the north end of Hyde Lake.

Q. You also dredged a channel between Wolf Lake and Hyde Lake, didn't you? A. Yes, sir.

Q. When did you do that? A. I can't locate the date exactly. After Mr. Dodge dredged north past this railroad, I turned his dredge around and in going south there was quite a channel across there, and when it came to the channel I turned the dredge east, and went into Wolf Lake. I think about the latter part of September. I can't locate the date exactly, but not far from the latter part of September that that channel was cut through.

Q. Did you dredge through Hyde Lake southeast? A. No, sir; that was done next year under Mr. Whitney.

Q. This dredging here on the southwest corner of Hyde Lake was done then in 1887? A. I suppose so, but I don't know.

Q. Do you know whether that connects with the other channel that was made running northeasterly? A. I do not. I have never been there since they surveyed that line.

Q. Did you participate in the early survey, running the lines of the railroad and determining the location? A. No, sir; I did not.

Q. The location had been fixed then before you were called in to do the work? A. No, sir. There had been a preliminary line run, but I used only a very small part of it.

Q. You changed them? A. Changed it very materially in different places. Mr. Erickson made the preliminary survey, I think.

Q. You caused it all to be graded? A. Yes, sir.

Q. To the extent of several feet, wasn't it, in height? A. It is graded on a level with the main track of the Pittsburgh, Fort Wayne and Chicago Railroad, that is, of their sub-grade, about four feet above the water level, the year that I was there. These maps do not look at all familiar to me, because during the entire season of 1886 the water was very much higher than shown on these maps; very much higher.

Q. The water was extending over the ground where the railroad runs to a considerable extent, wasn't it? A. Nearly all the way.

Q. How deep was the water along there? A. Well, at the point where I showed you that Mr. Dodge's dredge went in, it was deep enough to let his dredge float right on to the railroad line, four feet deep.

Q. I wish you would locate that. Point where Mr. Dodge's dredge went in, if you please. You can describe it as you locate it on the map. A. I can't recall the names. There was a gentleman owning a little tract of land right in this corner (indicating). Mr. Bennett was there with him once or twice.

THE COURT: What is it marked?

MR. DENT: That is marked "DeWitt," isn't it? A. It is marked DeWitt here, but that is not the name. It was near his south line.

THE COURT: Near the south line of the small tract? A. Near the south line of the small tract that I had the dredge floated in and went to work.

Q. Floated in from where? A. From Hyde Lake. It was part of Hyde Lake, right into the railroad line.

MR. GREGORY: That shows water right on there (indicating). You do not mean that you floated a dredge over there from Hyde Lake into Wolf Lake? A. No, sir.

THE COURT: Hyde Lake to the line of the railroad track? A. From Hyde Lake to the line of the railroad track. That is near the center of section 20.

MR. GREGORY: There is a discrepancy in the two maps. The one at the left shows the water invading the original four and a half acres in 20 and going beyond the meander line, which is, I think, correct. The other one shows the water just touching the meander line, but there it shows the water right against the railroad track, in the one on the left, just as this witness says, only he says it was deeper.

MR. DENT: In reality then you took the dredge and went to work in Hyde Lake nearly upon the east and center line of section 20, with that particular dredge? A. Yes, sir; with Mr. Dodge's dredge I commenced work near the center of section 20.

Q. In Hyde Lake? A. In Hyde Lake, and dredged northward.

MR. GREGORY: You do not mean near the center of section 20? A. Yes, sir.

MR. DENT: The other dredge worked up from the south towards that point, did it? A. Yes, sir; until it just passed the north line of section 29; then it turned southward, and the north dredge, after completing the cut to the north, turned southward and met where the other dredge had excavated north of—well, in the south part of section 20. I can show that possibly. Mr. Davis' dredge worked up to about this point (indicating); then, so as to keep both dredges busy, the one going north, I turned Davis' dredge around, and cut this channel, while the other dredge turned about and dredged this part (indicating), finishing nearly the same time.

Q. Then Mr. Dodge's dredge cut south through section 20? A. Mr. Dodge's dredge did nearly all the work in section 20.

Q. And the other dredge did the work through section 29 largely, and 30? A. 29 and 30.

Q. About what was the depth of water through which those dredges ran, say, commencing with the north line of section 30?

THE COURT: They made the depth as they went along, didn't they?

A. You mean before there was any excavation?

MR. DENT: Yes, before any excavation? A. Well, at points the land was dry.

Q. And at others you found some water, didn't you? A. Right at this point (indicating) there was quite deep water. It is not shown on either map.

Q. State what that point is, and explain as you go along. A. It may be further south, a slight curve in the railroad near this line, and it may be south of it.

Q. You are speaking of near the south line of section 30? A. Near the south line of section 30 there was two feet of water when I surveyed it.

THE COURT: South of it? A. Yes, sir, I think south. Then between that point and where the channel is made between the lakes, was quite high. Early in the spring there was six or eight inches —from that to a foot—of water on it. Later in the season it dried off so that it was almost dry ground, but at this point (indicating)—

MR. DENT: You are approaching now the north line of section 30? A. Say 200 feet north of the northwest corner of section 29, two or three hundred feet—no, the west quarter corner of section 29—300 feet north of the west quarter corner of section 29 there was quite an inlet in there, five or six hundred feet across, that was deep water; so deep we could scarcely wade it in locating the railroad, and the lake opened directly into that, so that our bank washed out about the middle of October. This bank washed almost entirely away and we had to rebuild it. Then right at the point of this curve there were quite high ground again, and timber.

Q. That is, north of the— A. That is in the north half of the northwest quarter of section 29, the south part of it—well, the north part of it; was prairie north all the way, and in the spring was covered with water. Later in the season the surface dried off as the water receded.

Q. I understood you to say that there was a wash out there in October? A. It was near the center of the northwest corner of section 29.

Q. What was done when that washout occurred? What was done in reference to the running of the trains? A. That was before any trains were running. We were simply laying the tracks, and I had the dredge replace the embankment again, lay the track over it.

Q. Didn't you take down at that time cinders and other material to fill up the gap that had been made by the lake at that place? A. I don't remember of hauling any cinders. I put in some old ties, and rubbish, and street sweepings, and earth of that kind.

Q. How large a crevice was made there? How large was the opening in the railroad? A. Well, it didn't break the embankment entirely away. Our embankment was 27 feet wide on top, and our track was laid on the west half of it, and it simply washed out from under the ties, so we completed the bank again with this rubbish I hauled in there, so it was possibly 200 feet long.

Q. What was the character of the ground through which you cut between the two lakes?

THE COURT: The character of the soil, you mean?

MR. DENT: The character of the soil; yes, sir.

A. There is but very little soil on that ground. Possibly six inches or a foot of black soil; looks like decayed vegetation, and the subsoil is of sand, lake sand.

Q. Was it overflowed at the time? A. Between Hyde Lake and Calumet River?

Q. Yes, sir. A. No, sir.

Q. Between the two lakes? A. Between the two lakes there was a deep channel there all the time, narrow but quite deep, so you could run a boat right through it.

Q. Was the water, however, outside of that channel north and south? A. It was north, not south. South it was quite high ground, but north it was low for several rods.

Q. On the right of way north of the channel and up to section 30 what was the character of the soil? A. Through the north part of section 30?

Q. Through the north half of section 29 and north of the channel? A. There was only one point in that whole half mile that was above water when I was building there, and that was near the center of section 29. I remember distinctly that I had to wade water all the way.

Q. On that map then it would run from near the channel above which Mr. Field's name is put across the McDaid tract as represented there, wouldn't it? A. This map over here, if you will just imagine that this dark brown is all covered with water, would represent very closely Hyde Lake when I was there. And just imagine that that is about two feet under water. You can see the outline very closely of Hyde Lake during the year 1886.

Cross-Examination by MR. BENNETT.

Q. Was the water very high in 1886? A. The people that lived there say it was extremely high. I don't know.

Q. Had you seen the lakes before that? A. No, sir.

Q. That was the first year you saw them? Looking at the other map, this water indicated by my cane here north, that is the quarter line of 29, (indicating). Is that the place where the deep water was, where you say there was a washout? A. Yes, sir.

Q. Then if the engineers have correctly put the figures of elevation at the bottom there, you can tell how deep it was? A. The water when I came here—I took the elevation from bench marks that Mr. Taylor gave me—I think were nearly six feet above datum.

Q. Did you establish a bench mark where this slope was cut through the ridge—your people? A. I don't just remember now where I had—I had a bench mark at the north end of Hyde Lake that I established, but I don't —I think I always took my measurements at that point, and then used the surface of the water for other elevations that I might want.

Q. You have other bench marks established there by some of your surveyors? A. Yes, sir; we established points there for locating that bridge, and taking our elevations from them.

Q. Were you on the dredge when it was taken through there? A. Only part of the time.

Q. Could you point out on the map the course it took? A.

Yes, sir; on both of them. Mr. Dodge's dredge, or Mr. Davis' dredge, did all of this excavation called here the "Artificial Channel."

Q. I mean the dredge that went to the north end? A. Then Mr. Dodge's dredge, as soon as it could get out of this into deep water, followed close along the west of Hyde Lake, until we got very nearly across.

Q. You found a place when you got in there of deeper water? A. Yes, sir.

Q. Was it large or small? A. It was narrow all the way up.

Q. After you came over here? A. Here is quite a body of deep water, but it is deeper to the north and to the west than it is here. It is shallower than it is north and west.

MR. STRONG: Q. Are you the county surveyor for any county? A. No, sir.

Q. Have you been? A. I have worked in county surveyor's offices.

Q. But you were not the county surveyor yourself? A. No, sir.

MR. GREGORY: Six feet above datum in 1886, when you were there on the work? A. When I first came on the work.

Q. The water was six feet above datum? A. Yes, sir.

Adjourned to Tuesday, November 10, 1891, 10 o'clock A. M.

JOHN A. COLE, a witness called on behalf of the defendant Conrad N. Jordan, having been first duly sworn, testified as follows:

Direct Examination by MR. BENNETT.

Q. What is your business? A. Civil engineer.

Q. Were you educated for that business? A. I was.

Q. Where do you live? A. Hyde Park.

Q. Are you a licensed engineer in this county and state? A. I am.

Q. How long have you been engaged in that business? A. About thirty years.

Q. What positions have you occupied as civil engineer? A. Engineer of the Town of Lake View, engineer of Hyde Park, consulting engineer of the City of Minneapolis, consulting engineer of Hyde Park and some other cities.

Q. What is understood by datum, Mr. Cole? A. It is an arbitrary point that was established by the canal commissioners, as I understood, at an early date, showing elevations in the city and county.

Q. How early was it established? A. In 1847, I think, is the date.

Q. Has there been any record kept of the elevations of Lake Michigan, any official record in the City of Chicago during any period of years passed? A. There was a record begun by an officer of the United States Government, as early as 1855, and after a few years, the record was continued by the City of Chicago, the

engineering department of the City of Chicago, and extended until the present time.

Q. Does the City of Chicago have the early records before they commenced to embody it, so as to make the series complete back to 1855? A. The first twenty-five years from 1855 were printed in one of their annual reports. The original records of that term were destroyed, as I understand, by the fire; since the fire the records are preserved, and are in the office at present.

Q. You say they are there now? A. Yes, sir; they are there at present.

Q. How frequently are the elevations taken and recorded? A. I understand they are taken three times a day.

Q. I will ask you, Mr. Cole, if you have ever examined these records, and made any exhibit of the state of the water as to elevation in Lake Michigan, from 1855, inclusive, to date? A. I have done so from the official records, made the plat, which is hung up.

Q. Have you present, or is there present, the result of that examination? A. It is.

Q. Is the map now before you that exhibit? A. It is.

Q. Will you please step to the map, and explain the map, what it shows? A. The dark horizontal line running through the map represents the datum line. Each line above and below represents a plane one foot below that.

Q. Or above? A. Or above, so that the first dark line is datum, the next is one foot above, the next two feet, the next three feet above, the next four, so below, the first line is one foot below datum, the second two feet below datum.

Q. You made the upper line? A. The upper lines; these were drawn to represent on the vertical line, which represent the high or highest point reached by the water of Lake Michigan during that year, the maximum height for a given year. The yellow line shows the lowest point.

Q. Is that the datum line? A. That is the datum line; the lowest point reached at any time recorded during that year. The middle line, which is colored blue, represents the mean level of the lake as made up from all of the heights taken during the year, indicating the mean level of Lake Michigan for each year.

Q. What are those figures at the top of the column? A. The figures at the top of the vertical column represent the year; the horizontal line, the elevation that is given, and the lines are drawn properly to a scale to indicate that height.

Q. What are the years shown on that exhibit? A. 1855 to 1891.

Q. Both inclusive, so far as 1891 is concerned? A. 1891 represents ten months, the ten months of 1891.

Q. Refresh your memory from the exhibit, and state the year of the elevations, or lowest year of water during this period. A. The lowest point ever reached, as shown by these records, was in 1881, where a record was made minus 2.19 feet below datum.

Q. State the stage the next lowest, just state the other low year. A. Another low year was in 1866, where the low record was minus 1.08 below datum; another low year was in 1869, minus one foot; in 1872, minus one foot, and the last years, 1890 and 1891, have minus .99 foot.

Q. Below datum? A. Yes, sir; below datum; nearly one foot below datum.

Q. Now, Mr. Cole, you may state the years when the level of the water was the highest during that period? A. In 1858, the record of high water was made, 4.65 above datum.

Q. Is that the highest? A. That is the highest; in 1876 or in 1886, 4.41; in 1876, 4.31 feet; in 1861, 4.4 feet.

Q. Give all the other highest points, please, in that period? A. 1865, 3.66; 1870, 3.35 feet; 1883, 3.81 feet; these are the highest points reached.

Q. What was the highest elevation in 1874? A. 2.91 feet above datum.

Q. What was the lowest elevation in 1874? A. The lowest elevation in 1874 was .34 feet above datum.

Q. How many years during this period was water lower than in 1874, according to that exhibit?

THE COURT: You mean from 1874 on?

Q. Either way, both ways, forward and back; you might name the years? A. 1855, 1864, 1865, 1866, 1867, 1868, 1869, 1872, 1873, 1875, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891.

MR. GREGORY: 1871, wasn't that? A. No, it was about the same height, .3 foot.

THE COURT: Q. In those years it was higher or lower? A. Lower than the lowest point reached in 1874.

MR. BENNETT: How did you arrive at the mean line, intermediate line? A. That is given by the City of Chicago; the calculations are made by that department, and is a matter of record.

Cross-Examination by MR. GREGORY.

Q. Mr. Cole, are you familiar with Hyde and Wolf lakes? A. I have seen them, sir, a few times.

Q. Do you know how the level of the water in those lakes compares with the water level of Lake Michigan generally. A. No, sir; I think not generally; I have noted it at certain times; for instance, in 1884, in the fall of 1884, the level of Hyde Lake was about the same as Lake Michigan, as the mean level of Lake Michigan, but I have had very little occasion to notice.

Re-direct Examination by MR. BENNETT.

Q. How far is the mouth of the Calumet River at the shore of Lake Michigan from what is called the outlet, if you know what that is, to Hyde Lake, the old outlet? A. I don't remember, sir, what that distance is.

Q. Well, what is your estimate about it? A. I should think it was a matter of three miles.

Q. Three miles? A. Yes, sir.

THE COURT: The outlet is three miles?

MR. BENNETT: The outlet of Hyde Lake west from the Calumet River is three miles from Lake Michigan.

Q. I will ask you, Mr. Cole, if while you were engineer of Hyde Park you took levels from the south part of Hyde Park pretty generally, and made a map showing those levels? A. Yes, sir; I did.

Q. Are the levels as shown on that map correct? A. They are correct, I believe, as they can be made.

Q. Take the portion of the territory of Hyde Park south and southeast from South Chicago, how does the levels above datum range according to that map and your recollection? A. It is so long since I have looked over this map, that I have not a very clear recollection of it. The land is all low; very little of it is many feet above datum.

Q. Well, now, how many feet do you mean? A. I should suppose that the larger part of that area would be not over three or four feet above datum.

Q. Have you got one of those maps that you could produce in connection with your testimony here? A. I have one in my office; yes, sir.

Q. Will you produce one? A. Yes, sir.

Q. Do you recollect, or do you know, whether immediately at the outlet of Hyde Lake on the west towards Chittenden's bridge, the bottom of the outlet, so called, is above or below datum, or did you ever take measurements there? A. Yes, sir; I have taken it; it is above datum.

Q. Where is Chittenden's bridge? A. It is across the Calumet River.

Q. Which way? A. West of Hyde Lake, about midway of the lake.

Q. Which way from the outlet of Hyde Lake that I have inquired of is Chittenden's bridge, and about how far? A. What is that question?

Q. Which way is Chittenden's bridge from the outlet of the Calumet River? A. It is northwest, I should think, about a half mile.

Q. Do the waters discharge at Chittenden's bridge from the Calumet River when they do discharge? A. They would: yes, sir.

Q. Is that the point at which they would empty into the Calumet River? A. Yes, sir; that is the point.

THE COURT: I don't understand that.

MR. BENNETT: Here is Chittenden's bridge; the outlet is about here, and the Calumet River there.

THE COURT: Do you know where is Chittenden's bridge?

MR. BENNETT: Yes, it shows there.

THE COURT: Oh, yes; I understand now; what is the question about the water there being above or below datum?

MR. BENNETT: The witness is asked and answers that immediately at Hyde Lake, the outlet or bottom of the outlet is about datum.

MR. GREGORY: That is the old natural outlet?

MR. BENNETT: Yes, sir.

MR. GREGORY: Q. How much above? A. I don't know how much above.

MR. BENNETT: Q. Now, assuming, Mr. Cole, that the mouth of Wolf River is closed, land-locked, and knowing, as you do, that the bottom of the outlet is above datum towards Chittenden's bridge, and that the distance of the discharged water, from Hyde Lake to Lake Michigan and the Calumet River, is three miles, and that there is no cut or ditch between Wolf and Hyde Lake, how much or in what way would the waters of Lake Michigan affect the elevation in Hyde Lake?

MR. DENT: I don't understand that that supposed case has been proved.

MR. BENNETT: If we don't prove it, it is not evidence. We expect to prove by the man that dug the ditch that there never was an outlet there until he dug it.

THE COURT: Between the two lakes?

MR. BENNETT: Between the two lakes. (Question read.)

A. Lake Michigan is the outlet of the Calumet River, and when a large flood of water is pouring down the Calumet River, if Lake Michigan was high, it would back the water up over Hyde Lake, and up over the low lands; if it is not, if the river, at other times, when there are no floods, the channel of the Calumet River being deep and broad, and comparatively a small amount of water passing through it, the elevation of the water in Hyde Lake I would expect to be about the same as Lake Michigan; it would not be subject, I think, to the extremes of either high or low water, but would show about a mean with Lake Michigan.

Re-cross Examination by MR. GREGORY.

Q. At what point did you say the bed of this original outlet from Hyde Lake into the Calumet River was above datum? A. I did not say how much; my recollection is about datum.

Q. At what point, did you say—at Chittenden's bridge? A. No; my recollection is that the elevations would show near Hyde Lake.

Q. Well, what is the character of the bed of that outlet; is it sandy? A. Yes, sir; my recollection of it is that it was a sandy bed.

Q. Subject to variations, then? A. Oh, I presume so, by heavy currents.

Q. Well, I suppose, as a matter of fact, and in fact, that is what I understood you to say, that when there was a considerable accumulation of water in the river in that region, and the water of Lake Michigan was high, it might affect the level of the water in Hyde Lake by water setting back? A. Setting back; yes, sir.

Q. And that as far as you knew the water in Hyde Lake at some time which you did not distinctly fix would usually stand about the same level as the water in Lake Michigan? A. Yes, sir.

Q. Now, has that been changed by the improvement of the Calumet within recent years—deepened? A. I don't think I have seen the lakes since the improvements were made.

Q. What time do you refer to then? A. I refer to about 1884.

Q. Well, now, would the question of whether there were or not any channel between Wolf Lake and Hyde Lake cut any figure? A. I should think it would some; Lake Michigan would be some nearer to Hyde Lake in that direction than the other, and yet the channel being somewhat higher, it would not probably make very much difference.

Q. It would not make much difference? A. No, sir.

Q. Are you aware as to whether there ever was any natural channel between these two lakes at any point? A. No, sir.

Q. Are you familiar with the strip of land that extends between them? A. I have been across it; yes, sir.

Q. Do you remember what appears to be a natural depression in the south part of section 20, kind of a break in the ridge and in the trees? A. There is a place that is lower than it is either to the north or south, and there is what appears to be an artificial ditch cut across at that point.

Q. That is where the railroad bridge is, is it not, just south of the Field place? A. Yes, sir; I think it is south of the Field place.

Q. I refer to considerably north of there, and south of Smale's house—the ridge, do you remember that? A. I don't remember that, sir.

Q. Now, is it your impression, generally, that during this very time for which you have given levels for Lake Michigan, that the water in Hyde and Wolf lakes would correspond approximately with those levels? A. I think they would at ordinary stages of the river, as I said before, but not at high stages.

Q. At high stages you don't think that the setting back of the water from Lake Michigan would raise those lakes above the level of Lake Michigan, do you? A. I am speaking of the water coming down from the back country, which floods the river.

Q. That would gather waters from the natural basin around there? A. Yes, sir; from a large area there.

Q. And that would to some extent tend to raise them above the level of Lake Michigan, would it? A. Yes, sir.

Q. So your impression would be at times of high water, the water in these lakes might be even higher than Lake Michigan? A. Yes, sir.

Q. Have you been down there since the railroad was built on the west of Hyde Lake? A. Yes, sir.

Q. Does the throwing up of that embankment there, in your opinion, have any effect on the level of the water? A. I should think not, sir; you speak of the west line?

Q. West of Hyde Lake; yes, sir. A. No, sir; oh no; I should not think it would have any effect upon it at all.

Q. Wouldn't it tend to detain the waters in Hyde Lake? A. My recollection—

Q. Would it tend to detain the waters there drained into Hyde Lake? A. My recollection is there is a large extent of that road that is built upon piles.

Q. Isn't there a considerable portion of it on an embankment, and wouldn't that tend to prevent draining the water from the west of the railroad into Hyde Lake? A. I should not think so; I made no special examination.

MR. BENNETT: Q. What effect, if any, would evaporation have in the elevation of the water in the water on Hyde Lake in the summertime—in August and September? A. It would reduce the level very materially.

Cross-Examination by MR. DENT.

Q. Were you examined as a witness, Mr. Cole, at the trial before Judge Blodgett in the case of Hardin against Jordan? A. Yes, sir.

Q. Were you examined as a witness in the trial of the same case of Hardin against Jordan before Judge Gresham in 1885 or 1886? A. Yes, sir.

Q. You were called by whom at that time, Mr. Cole, as a witness; what party called you? A. What were the parties?

Q. Were you called by Mr. Bennett? A. By Mr. Bennett; yes, sir.

Q. That was on the part of Mr. Jordan, then, was it not? A. I think it was; yes, sir.

Q. Had you taken your elevations with reference to the trial of that case, or to your being called as a witness in that case? I think you said you took some in 1884, had you taken these elevations with a view to being called as a witness? A. Yes, sir; I suppose; I think so.

Q. You said, I believe, that a large part of all that territory around the lake was quite low? A. Yes, sir.

Q. Around both these lakes? A. Yes, sir.

Q. On the north side and south side and west side? A. That is my recollection.

Q. And between the two lakes also? A. Yes, sir.

Q. Not very much above datum in any place, or not in many places above datum? A. The larger part of the area was not many feet above datum, is my recollection.

Q. When you get down to the vicinity of the lakes, the border of the lakes, what is the character of the soil? A. Of Wolf and Hyde lakes you are speaking of?

Q. Yes, sir. A. My recollection is that the soil east of Hyde Lake is sand, and the western border of the lake is muck or soft black soil.

Q. Did you ever observe the lake to see whether there is a rim

or border on these lakes or either of them? A. There are bench marks or water marks observable along the borders of that lake, I think—of both lakes.

Q. Both lakes? A. Yes, sir.

Q. Did you survey around that border? A. Yes, sir.

Q. Where—what places? A. Between the two lakes.

Q. But on the west side of Hyde Lake did you survey around that border? A. Yes, sir.

Q. Where did you find the border or the rim? A. That I could not answer, sir; I don't remember.

Q. Could not tell? A. No, sir.

Q. How much were you about either of these lakes to take levels or do anything whatever? A. Not very many days.

Q. At what season did you visit them? A. I was there in the winter and in the spring and in the fall.

Q. In what year? A. My recollection is it was 1883, in the spring of 1883 and in the fall of 1884; that is my impression.

Q. Was that with reference to testifying in the case that I have spoken of? A Yes, sir.

Q. As to your giving testimony? A. Yes, sir; it must have been.

Q. When did you take the elevation at the outlet west from Hyde Lake, or about when? A. I don't remember the date of that.

Q. Was it at one of the times you have been speaking of? A. I am not sure of that.

Q. You say you found the elevation to be about one foot above datum, as I understand? A. The inlet; yes, sir; my impression is about a foot.

THE COURT: A foot what? A. A foot above datum at the inlet. I would not be accurate about figures; it was a long time ago.

MR. DENT: That was very near Hyde Lake, I understand you to say? A. Not a great ways from Hyde Lake.

Q. How far from Hyde Lake? A. I could not say.

Q. Was it a ditch?

THE COURT: What does he say?

A. I don't remember the location, but my impression is, it was nearer, I should say at least not more than one-eighth of the distance between Hyde Lake and the river.

Q. What was the distance between Hyde Lake and the river? A. This, as I remember it, was the highest point between the two.

Q. And about one-eighth of the distance from the lake over to the Calumet River? A. Not more than that I should say, perhaps not that.

Q. One-eighth would be westward from the lake, then, wouldn't it? A. A little west of the lake.

Q. How near the road that runs on the ridge west of Hyde Lake? A. My impression is it was near the road.

Q. I wish to ask you whether that was a natural outlet or inlet,

or whether it was a ditch dug between Hyde Lake and the Calumet River. A. I considered that a natural inlet.

Q. How wide was it?

MR. BENNETT: At what point?

MR. DENT: Generally, I speak.

A. It is difficult to answer that question; it would depend upon the height of the water in it, of course; my impression is that I have seen it when it was perhaps a rod wide or more.

Q. Which way was the water flowing? A. I don't remember about that, sir.

Q. Could not say whether it was flowing? A. I could not remember whether there was any motion or not.

Q. There was always water there, wasn't there? A. I never saw it dry.

THE COURT: That is the outlet of the Calumet River? A. Between the Calumet River and Hyde Lake.

MR. DENT: Do you know whether the mouth of Wolf Lake has been closed all the time? A. I don't know anything about that.

Q. Never been there? A. Never been there.

Q. Do you know whether the water flows or runs from the Calumet over to Hyde Lake? A. From the Calumet River?

Q. Yes, sir. A. Into Hyde Lake?

Q. Yes, sir; have you seen it running or flowing that way? A. No, sir; I can't say I ever have.

Q. You think, however, that you took the elevation of Hyde Lake at one time, when it was about the same as Lake Michigan, if I understand you? A. Yes, sir.

Q. When was that? A. In 1884.

Q. Would you recognize a copy of the plat or map which you made after you had surveyed for Mr. Bennett, in order to testify as a witness. A. I think so.

Q. I wish you would look at this and see whether that is it. A. Yes, sir; this looks like it.

Q. When did you make that map, or the map of which that is a copy? A. I don't remember the date.

Q. Was that before you testified before Judge Gresham? A. It must have been before; yes, sir.

Q. Did you not testify before Judge Gresham that the survey which you made, and from which this map was made up, was made by you on the ice? A. I think I may have

Q. Did you not also at that time state that at the time you made the survey there was water under the ice up to what you marked as the meander line here on the west of Hyde Lake? A. I don't remember about that, sir; the record, of course, would show.

Q. This is represented as a meander line here, isn't it? A. Yes, sir; the dotted line, that is a meander line.

Q. And the dark line or the linked line is represented as the meander line? A. Yes, sir.

Q. Is it not a fact that there was water under the ice up to the

meandered line in this territory represented here on the west of Hyde Lake? A. In the winter?

Q. Yes, sir. A. I don't remember that that would be the case; there were places—

Q. I was asking you if you did not testify to that effect? A. I don't know, sir; if the record was taken it would show; my recollection now is that the water would reach the meander line in some places.

Q. In how many places? A. I don't know, sir.

Q. In a good many places, wouldn't it? A. I don't know that.

Q. Along west of Hyde Lake? A. The season is usually such that I would expect the water would be high in Hyde Lake; I remember distinctly that there was ice over the lake, but I don't remember at this lapse of time the minutiæ of the affair.

Q. You do remember, however, that the water would reach the meandered line in many places, do you not?

Objected to as putting in the witness' mouth what he did not say.

A. Your question is, that the water reached the meander line in many places?

Q. Yes, sir. A. Well, I could not answer that question; I don't remember distinctly enough to say.

Q. Didn't you say so at the time you testified before Judge Gresham? A. That I do not know; the matter was fresh in my mind, probably, at that time; it is not now.

Q. Now, is it not a fact that this representation of Hyde Lake was intended to represent the open water of the lake at that time, and that the space west of it towards the meander line represented the low land, but not the open water of the lake, at that time? A. At the time the map was made I should say that was the case.

Q. But this low land was much of it covered with water at that time, wasn't it? A. You are perhaps confusing the time. Of course that is a very large tract of land, and the survey covered a considerable lapse of time. Now, there were times in making that survey when the work was done on the ice, and there were other times when the ice had gone and the land showed that brown as that shown on the map.

Q. Do you mean that sometimes this representation of Hyde Lake shows the open water of the lake, and at other times the water stands further west? A. My recollection of it is, that when the map was made, this scale representation of the lake, but that part of the line, the outlines were run on the ice in the winter time when it was much more convenient to get about; now that is my recollection of that survey.

Q. Didn't ice and snow extend along on the meander line and near it at that time when you surveyed in the winter? A. My recollection is that the whole country around there was covered with ice and snow.

Q. Then in surveying the meander line you would have to go

on the ice most of the way, would you not, or most of the time? A. I think the whole country around there was covered with ice at that season of the year.

Q. Well, now, at times, as I understand you, the water would flow or would stand on the west of Hyde Lake as you have it represented here for the open water; would not that be the case also east of Hyde Lake and between Hyde Lake and Wolf Lake? A. How is that, sir?

Q. Would not the water be in this same situation at the same time? A. At the same time?

Q. Yes, sir. A. Well, it no doubt would at the same elevation.

Q. Well, are not in fact the elevations about the same west of Hyde Lake, up to the meander line, that they are east of Hyde Lake between Wolf Lake and Hyde Lake, with the exception of the ridge that projects from the north? A. I don't think there is much difference; the same is true further west. There is not very much difference in the elevation of that land anywhere in that vicinity in my impression.

Q. Did you not before Judge Gresham testify that there was water on this space of road between Wolf Lake and Hyde Lake at the time of your making one of these surveys, the same as on the space represented as between Hyde Lake and the meander line?

MR. GOUDY: We object to that; he is examining the witness now as his own witness. It is no cross-examination of anything brought out here; he is asking him what he testified to before Judge Gresham; it is immaterial unless it is with a view of impeaching him. He cannot impeach his own witness.

THE COURT: It is not his own witness.

MR. GOUDY: It is on this subject; we have not asked him a question about that map. It is not in evidence.

THE COURT: You asked about the elevation of the land and the water there; it bears on that, don't it?

MR. GOUDY: I don't see how; he is calling his attention to a map made in 1884. There has nothing come out except by Mr. Dent.

THE COURT: Not about the map, but there did about the survey and the height of the water and this map made in connection with it. It seems to me that it is legitimate cross-examination, but if he asks him for the purpose of impeaching him, he ought to read his testimony if he has it, so that the witness may be advised.

MR. DENT: I have given the substance of the testimony as near as I can; the testimony has not been written out; if it was here I would be quite willing to read it.

(Question read.)

A. Yes, sir; my recollection does not serve me in regard to what I testified before Judge Gresham.

Q. Did you not so testify in regard to this space, that it was low, as low as west of Hyde Lake, or substantially so, and that there was water on the space between the two lakes? A. I have

no doubt that I have seen water on it, but that I testified it was as low as the other side I don't believe I could have said it; I don't believe this.

Q. You did see water on this space a long distance?

MR. GREGORY: That is objected to; it does not convey any idea.

THE COURT: It does not convey much idea to the Supreme Court.

Q. My question applies particularly to the space on this map between the word "McDaid" and the word "Field," and then south of "Field" for a distance down to the cut or outlet between the two lakes, the map is before us here and you can see it—wasn't water in that space? A. You mean to ask me if I testified that there was?

Q Yes, sir. A. I don't remember what I did testify.

Q. Is it not a fact that you have seen water there on that space? A. Oh, I think I have; I have seen very high water.

Q. Now, will you look at this map and see whether this part which is represented here about midway between the two lakes and from the meander line north in section 20 down to the word "McDaid" was intended to represent a road? A. Yes, sir.

Q. That was higher land, was it, than the other? A. Yes, sir; it is represented that way.

Q. What enables you to represent that road, Mr. Cole—how were you enabled to represent it? A. By survey.

Q. Did you or not testify before Judge Gresham that you represented that from your survey and assistance given you by Mr. Bennett in representing it—Mr. John I. Bennett? A. No recollection of any such testimony.

Q. What was the space on either side of that little strip, which is a thin narrow strip intended to represent as to the character of the growth or soil or physical features? A. You mean the dark lines that show trees—foliage?

Q. From the McDaid place northeast there are some dark lines and in that space there were trees shown, you think? A. Yes, sir.

Q. There were trees? A. Yes, sir.

Q. Now, on either side of that thin, narrow strip, as represented there, what are the physical features of the land? A. It would be marshy or grass land. It represents wet land or grass growing.

Q. That marsh, then, would extend from the McDaid place down to the Field place, where a similar representation is made of trees, would it? A. It would, I should think; yes, sir.

Q. Then from the Field place to Reese's Point it would be marshy again, wouldn't it? A. That Reese's Point was higher again; higher land.

Q. But between Reese's Point and the Field place there would be this marsh, would there not, as represented on this plat? A. I don't mean to say necessarily a marsh; it represents grass land and

different in its character from the higher land where the trees are growing; my recollection of it is, it is sandy soil.

Q. The trees were only growing on this little thin strip? A. Yes, sir; that was made to represent where the trees were growing, and the same to the south; no trees unless there was willows; I think there was a willow some six inches in diameter, but with such exception the dark lines show where the trees was growing, where they are growing I presume to-day, and the other where the grass was growing.

Q. Much the greater part of this open space between the water of these two lakes would be this marshy growth? A. It wouldn't be strictly proper to call it marsh land.

THE COURT: You have corrected that two or three times.

A. The land to the west of the lake I call a marsh, that is boggy, and it would be difficult to walk upon it in any season, but the lands between Hyde Lake and Wolf Lake are not that way; they are solid, strong, solid ground, and when the water is not covering it our teams could go over it in any direction, and it becomes perfectly dry at times.

Q. Did you not testify that you did not survey the outline of Wolf Lake, Mr. Cole, before Judge Gresham? I don't remember, sir.

Q. How is it as a matter of fact, did you survey the outline of Wolf Lake? A. My impression is that I made measurements myself from the ridge where the trees are shown here to the border of Wolf Lake at several different points.

Q. But that was east of the survey? A. It was not in particular; it was not surveyed with the thoroughness which the portion to the west was.

Q. Did you not state that the distances, however, over to Wolf Lake were mainly put there with the aid of Mr. Bennett, or by his direction and the material he furnished you? A. I have no recollection of any such testimony.

Q. Did you testify that you did not know of any road that had been made on the point on the north, the small point on this, Reese's Point, as shown on this plat or map; there is a road shown part way, isn't there? A. Yes, sir; there is a road; I think there is an error in that map to that extent; there was a plainly marked road a portion of the way through the trees or higher ground and also below, and I remember in that case that I concluded that the carrying of the road through was an error. I believe it was brought out first at the time, a road on the snow and which it might have been

Q. Did you not testify, however, that you did not know of that road, and that you had marked it there from material that Mr. Bennett furnished you? A. I don't think so, sir.

Q. Or according to his direction? A. I don't think so, sir, but I don't remember it.

Q. Did you, as a matter of fact, ever see a road there? A. I

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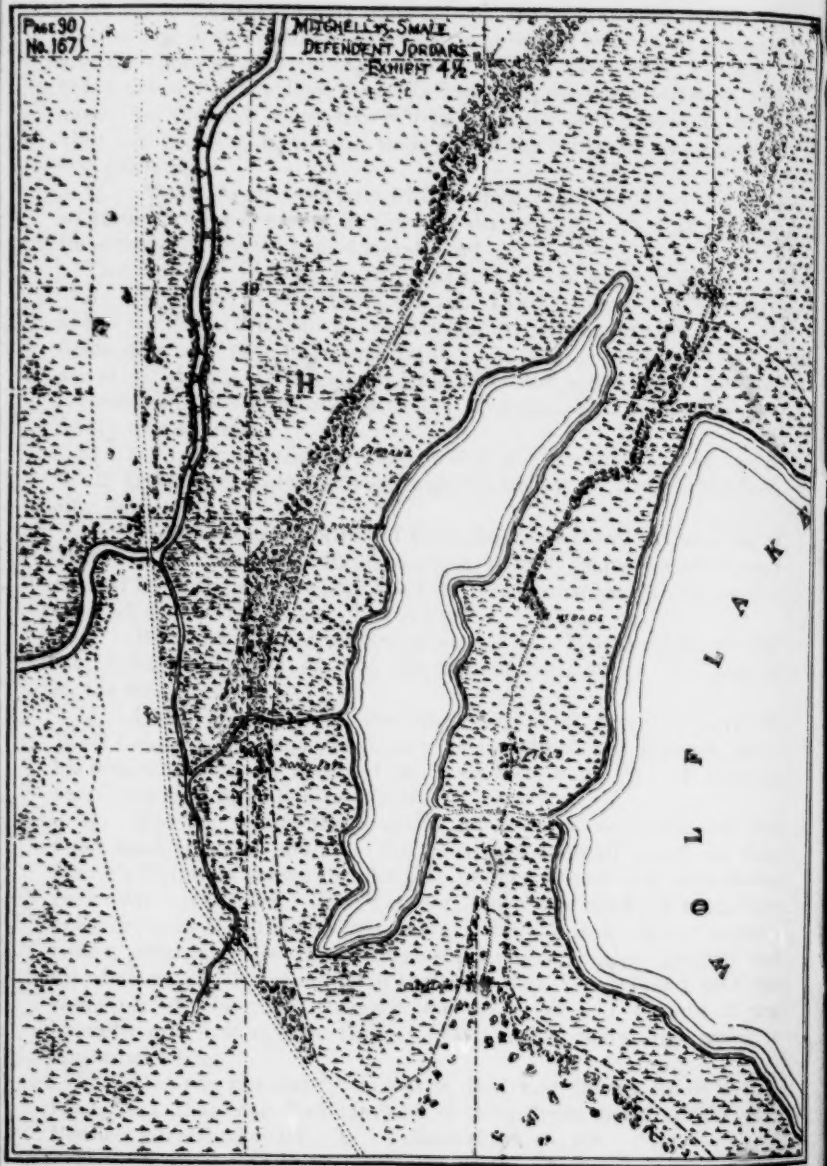
JORDAN'S EXHIBIT 4½ AND HARDIN'S EXHIBIT 1, COLE.



Plat showing topography of parts of
Sections 19, 20, 29, 30, 31 & 32 T. 37 N. R. 15 E. of 3rd P. M.
1883.

rode in a buggy along over that ground, and wherever there was a ditch or anything to prevent a buggy going over it, there was a bridge, but that there was a distinctly marked road, I could not testify all the way.

Q. Was there not ice when you drove over there? A. No, sir.

Q. Didn't you drive over the ice? A. No, sir; Oh, no.

Q. Didn't you drive through the water in the lake in driving there? A. There was some water, I don't remember how much, but I should say not a great deal.

Q. You drove through the water, didn't you? A. My recollection is, that there was perhaps a foot of water in some places where the passage was made. I am not sure that there was as much as that.

Q. That water extends from one lake to the other, don't it? A. Why, I think not, sir; I think not.

Q. Do you mean to say it did not? A. I think not; that is my impression.

Q. Where was the water then? A. My impression is that in making—in passing from the south to the north in a buggy, we drove down near, or within the border of the water of Wolf Lake at that time in order to get upon better ground than if I had had to have gone further east upon land which was high or rough, that is my recollection.

MR. BENNETT: Q. Do you mean further east? A. West.

MR. DENT: Q. You drove around in Wolf Lake? A. In the water of Wolf Lake.

Q. Were you obliged to go south or go north? A. To go north.

Q. Didn't you go the entire distance from Field's place, up to McDaid's place, through the lake? A. How far would that be, sir, I haven't a very distinct recollection of it, but my impression is it was not a very long passage through the water; well, I cannot tell.

Q. There would be either marsh or water then in the intervening space between the two lakes where you drove in the lake? A. It would be rough ground that we were driving over; I don't remember that there was any water there. I don't think there was.

MR. DENT: We perhaps should put that map in as evidence in connection with the testimony of the witness. There is a suggestion that it is already in, so I would not care to multiply it, except that I would like to have it understood it was a map marked "Defendant's Exhibit 4½" in the suit of Hardin vs. Jordan.

(Said map is herein inserted, marked "Jordan's Exhibit 4½" and "Hardin's Exhibit 1, Cole.")

2 P. M. Tuesday, November 10th, 1891.

JOHN A. COLE resumed the stand, and was further cross-examined by Mr. Dent, as follows:

Q. Mr. Cole, you presented a map showing the elevations of the lake for different years, 1855 up to 1891, I believe, as it is on the exhibit here? A. Yes, sir.

Q. Which was presented this morning? A. Yes, sir.

Q. I will ask you if that is a prolongation, enlargement or extension, of such outlines of the elevations of the water as given in the diagram to accompany a report for 1890 to the Department of Public Works of the City of Chicago? I show you Plate 11 from that report, on the diagram as given there. (Handing paper to witness.) A. Yes, sir.

Q. The diagram is just before you, I believe.

THE COURT: What report is that?

MR. DENT: That is a report accompanying the message of Mayor Cregier, in 1890, to the City Council of the City of Chicago.

A. Why, I presume the date in regard to the lake level was taken from the same source that I took mine.

Q. I wish to know as to that diagram, whether your diagram is an enlargement of that? A. Oh, no, sir; I never saw this before. No, sir. That is a very complicated diagram; deals with a large amount of other matters besides the heights of the lake.

Q. The plate, as a whole, is, or is not, that taken from this diagram here that is on the right hand part of the page? It has the years right below—1855 and 1874? A. Oh, yes; I presume taken from the same data.

Q. From the same data? A. Probably taken from the same data which is in the records, in the files in the City Engineer's office, made up and compiled from the same that I took mine.

Q. This is quite a short diagram here? (indicating). A. Yes, sir.

Q. Only occupying some three inches of space. A. Yes, sir.

Q. From right to left? A. Yes, sir.

Q. While that is much longer? (indicating). A. I never saw that. I made mine up from the official records—from the figures.

Q. That you did with Mr. Benezette Williams, an engineer, in and about making a report on Hyde Park to the authorities or trustees of Hyde Park some years ago? A. Yes, sir.

Q. Did you state there, or is it a fact, that the Chicago datum is the low water mark of 1847? A. That is the understanding; yes, sir.

Q. Did you also state that during that whole period of thirty years the average level of Lake Michigan has been 1.9 feet above datum? A. I presume I did. That is about the fact.

Q. Did you also state that because of winds the lake has some-

times reached the height of six feet? A. If you have it there I have no doubt it is the case.

Q. Did you also state that at no time has the monthly average been less than two-tenths of a foot above datum?

Objected to by Mr. Goudy.

A. I would say with regard to that record we were dealing with generalities and we may not have got strictly at the facts in a matter of that kind. The average level of the lake for business purposes and sewer building was usually figured at about 1.8 above datum as an average.

MR. GREGORY: One and eight-tenths?

A. 1.8 or .9 During the first twenty years we had an official record which gave 1.8 as an average for the twenty years. Since then it has been twenty or twenty-five years more.

* * * *

Q. Did you also state, and was it a fact, as you found, that the highest levels for the lake averaged not during June, July and August, but the months of the heaviest rainfall? A. I don't remember about that fact at all. Either Mr. Williams or myself were satisfied of it at the time that report was written if it is so stated. It was done several years ago, I think. That was 1883, I think.

Q. Do you know how it is as a matter of fact? A. As to the months?

Q. Yes, the months of June, July and August. A. No, I don't. I have no means of knowing.

Q. Did you say the average level for the two years, 1858 and 1859, was three feet? A. I don't know.

Q. What? A. I don't know.

Q. Could not tell? A. That would show it, the map I took; this was the way it was; this was all the information I had. (Leaving stand and going to map.)

Q. That would not give the average? A. This gives the average for the year, the yearly average of a year is along the blue line?

Q. For the two years 1858 and 1859 can you tell what the average was? A. The average for 1858 was 2.90, and the average for 1850 was 2.98 or nearly three feet.

* * * * *

By Mr. KENDALL: Q. Mr. Cole, did you ever locate on the ground on the west side of Hyde Lake the meandered line as shown on the government surveys of 1835 and 1874. A. I made that survey in 1883.

Q. And located the meandered line? A. And located the meandered line then as well as I could from the original government notes.

Q Where is the location of that meandered line with reference to the water in Hyde Lake, at the time you made your survey? A. I would say in regard to that survey—

Q. I will amend my question. In the northeast quarter of Section 30—I will limit it to the northeast quarter of Section 30. A. I think that survey was made to locate the meandered lines around the entire lake and covered the months of January, February and March. During that time we had all kinds of winter weather and various heights of the lake. At times the line was run through the lake, run when the ice was thick in the lake.

MR. GREGORY: Q. What survey are you referring to? A. The survey of 1883.

Q. The survey of 1883? A. That is the one I refer to now. And the topography was put on in March when the water was lower—was low, very much lower than it was at the first, as I remember it. That was the map which was introduced this morning, and gives a correct showing of the land and water at that time. That would be in March, 1883.

MR. KENDALL: Q. You mean the map that was put in evidence this morning by Mr. Dent? A. I mean the map that was put in evidence this morning by Mr. Dent. That was from actual survey.

Q. That was in 1883? A. 1883.

THE COURT: 1883 or 1886?

A. That is 1883.

Q. Have you had occasion to know with reference to it since that time? A. I don't remember that I have been personally over the ground since that time, sir. Surveys have been made, however, since that time from our office.

MR. DENT: The map, as I understood you, was made from the topography at the lowest stage of the water? A. I would not say that. It was made at a better season of the year. It was made in March.

Q. That is how I understood you to answer. A. My impression is that the water was considerably or a good deal lower.

Q. Didn't you say that it was when the water was lower? A. It was lower.

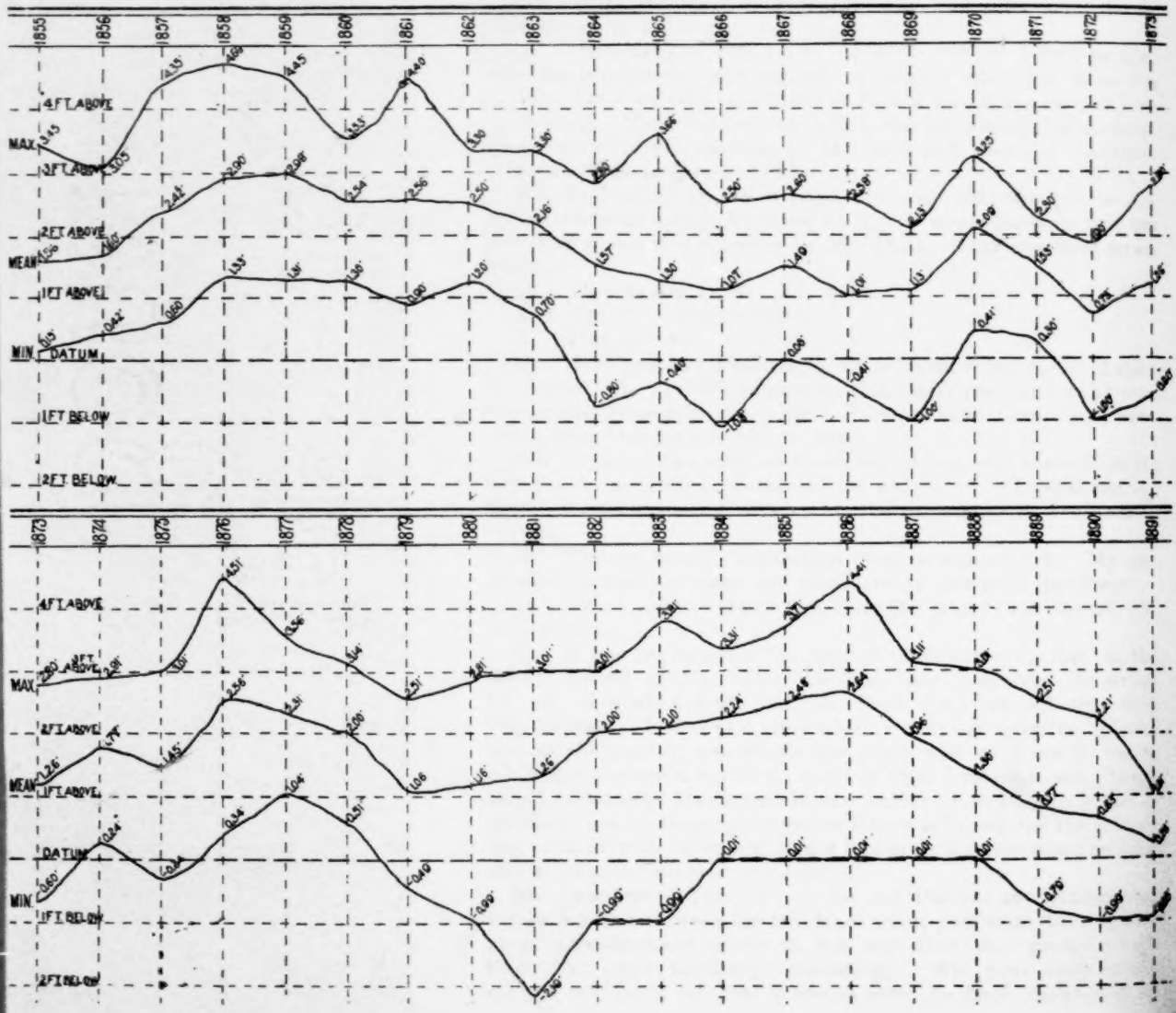
Q. It was the lowest at the time of these surveys; that is, the lowest period of the water was the time you were surveying it? A. I would not say that, Mr. Dent, for I am not sure that was the case. It was at a time when I could go over the ground and see the ground, see where the grass was, as I could not do when it was covered with ice. That is what I meant to say. There might be times in March that it was higher or as high as it was in January, but in January the entire lake was frozen and the ground was covered with snow, and it was frozen so that you could go over all that country without any trouble.

MR. BENNETT: You say you did not discover any graded road across the land between the two lakes when you were down there? Now, witnesses have sworn in this case that they graded a road from that place northerly (indicating). Was your examination such as you could say that it was an error to have shown that on

JORDAN'S EXHIBIT B.

DIAGRAM SHOWING THE ELEVATIONS OF LAKE MICHIGAN
FROM 1855 TO 1891.

CONSTRUCTED FROM THE RECORDS OF THE ENGINEERING DEPARTMENT OF THE CITY OF CHICAGO.



the map which was introduced by Mr. Dent, as Mr. Hardin's Exhibit 1? A. No, I could not. I find, by my original notes, that I myself showed a road on my note book; and I concluded at that time, on the trial, after the matter came up before, that perhaps there was a road that showed on the ice and on the snow, and I might have been mistaken as to that. That is all I can say. My notes show a road there.

MR. KENDALL: Is that the map to which you refer? A. Yes, sir.

Q. What was the character, at the time this survey was made, to which you have referred, of the ground east of the meandered line between that and what is shown as the open water on this map? A. It is a muddy bog. One could walk over it with care, by jumping a little.

MR. BENNETT: I will offer in evidence, as showing the state of the water, between 1855 and 1891, inclusive, the map referred to by the witness Cole, and mark it "Jordan's Exhibit B."

(Said map is herein inserted, marked "Jordan's Exhibit B.")

WILLIAM S. SHIELDS, a witness called in behalf of defendant Conrad N. Jordan, being first duly sworn, was examined in chief by Mr. Bennett, and testified as follows:

Q. What is your name? A. William S. Shields.

Q. What is your business? A. Surveyor.

Q. How long have you been a surveyor? A. For eight years.

Q. Where have you been during that time? A. In Cook County.

Q. Are you a licensed surveyor? A. Surveyors are not required to have licenses at present.

Q. Are you in business alone or with someone else? A. I am connected with John A. Cole.

Q. How long have you been connected with John A. Cole? A. For eight years.

Q. I will ask you, Mr. Shields, if you had anything to do with reference to the acquiring of data for the making of the map marked "Cole, Alvord & Shields, 1886–1890" (Jordan's Map C)? A. I had charge of the field work and arranged the outlines of the work from which this map was made.

Q. Were you present when the elevations and measurements were taken? A. Yes, sir. I assisted in taking those elevations.

Q. During what period were those measurements or levels taken? A. From the 1st of August, 1888, until the 12th of September following.

Q. What year did you say? A. 1888, the majority of the levels shown on that map.

Q. It is marked on the map "1886–1890"—how did that occur? A. Most of the survey was made in 1888.

Q. Was any immediately prior to that? A. There was one made in 1884.

* * * * *

Q. Was the data which you then obtained used in connection with subsequent measurements to make up the map before you, marked "Cole, Alvord & Shields' Map"? A. Yes, sir; a certain portion of it was.

Q. Where was this map made, Mr. Shields, in whose office? A. That map was made from a copy which was made in the office of Mr. Cole.

Q. Were you in Mr. Cole's office at the time it was made?

A. I made the map from which this one was drawn.

Q. You did make this map? A. Yes, sir.

Q. Who made this map? (indicating). A. Oh, that was made by a draughtsman in the employ of the city, Mr. Grossman.

Q. Under your supervision? A. Yes, sir.

Q. Have you compared the elevations on the other map with this one? A. Yes, sir.

Q. Do they agree? A. Yes, sir.

Q. I will ask you whether this map designated as "Cole, Alvord & Shields' Map, 1886–1890" (Jordan's Map C) is a correct map? A. It is.

Q. Does it show the lands and the water correctly as they were last, at the time the data was obtained and the map made? A. Yes, sir.

* * * * *

Q. Is the location of the meander line on the west, north, and partially on the south of Hyde Lake represented on this map (indicating)? A. Yes, sir.

Q. Did you have anything to do with running that? A. Yes, sir.

Q. From what, if you know, was the location made? A. The location was made from the government notes.

Q. From the government notes? A. Yes, sir.

Q. Do you remember when it was made or located? A. Part of them were made in the survey of 1883 and part of them were made in survey of 1884, and the remainder in 1888.

Q. Is that correctly represented on this map? A. Yes, sir.

Q. Of Cole, Alvord & Shields? A. Yes, sir.

Q. How did you locate the meander line? I did not understand your answer to the former question. A. That was located from the government notes—copies from the government notes.

Q. When were the government notes made? A. The government notes of 1828 or 1835; I ain't positive about the date.

Q. What body of water is represented on this map on the east part of sections 30 and 19, and on the southwest quarter of 20—mainly? A. The water in Hyde Lake.

Q. And what body of water is this to the east of the body of land east of Hyde Lake? A. Wolf Lake.

Q. What do the figures on this map represent? A. The elevations above and below Chicago datum.

Q. Elevation of what? A. Elevation of the surface of the ground.

Q What do the plus and minus signs means, or the minus sign and the absence of any sign before the figures? A. The absence of any sign means above datum.

Q. How as to minus? A. Minus, below datum

Q. Do these figures, wherever they occur on this map, indicate with reference to datum or elevation or depression of the surface of the land? A. Yes, sir.

Q These figures occurring over Hyde Lake, do they represent the elevation or depression of the bed of the lake above or below datum? A. They do.

Q. Where are the minus signs on this map so far as Hyde Lake is concerned, are there any in the east part of the lake? A. No, sir; there are not.

Q. On your best judgment and recollection, how many acres of this lake are shown here to be below datum? This is the bed of the lake (indicating). You may look at the map if you want to in order to answer that. A. (Witness goes to the map.) What is the question?

Q. How many acres, in your judgment, of the lake, of the bed of the lake, are below datum? A. Both lakes?

Q. Hyde Lake? A. About 80 acres of that below datum.

Q. Is that a mere guess or an estimate? May it not be less than that? A. Might be less that that. That is my estimate from the map.

Q. Wolf Lake or Hyde Lake? A. Hyde Lake.

Q. Then it would be indicated by the minus sign, isn't it? A. Yes, sir.

Q. Those are so indicated in that part of the map? A. Yes, sir.

THE COURT: That is what he said.

Q. Please state, after refreshing your memory from the map, what the lowest point below datum in Hyde Lake is, and how low? A. 2.4 feet is the lowest.

THE COURT: 2.4 below datum?

MR. BENNETT: Yes, sir.

Q. Where is that point represented? A. Located near the center.

Q. With reference to the east and west lines? A. It is about three hundred feet south of the center line, or the north line of section 30.

Q. How large an area is that there? A. It is very small, probably an acre.

Q. In what other localities of that lake is the bed below datum, and how much? A. All that part of the lake shown in blue color is below datum.

Q. I don't distinguish, Mr. Shields, the difference in color from the water there; is there a difference? A. This (indicating) in Hyde Lake, light blue color, is shown with a minus sign below datum, on this map.

Q. Were you over the lands between the two lakes in taking these measurements? A. Yes, sir.

Q. State, commencing at the Dewitt tract, what objects, natural objects, as trees, there were on the land going southerly as you made these measurements? A. We found a large number of elm trees and wild cherries and a heavy growth of underbrush on this part, the ridge, between Hyde Lake and Wolf Lake, south from the Dewitt tract.

Q. On the Condit tract? A. On the Condit tract; that is covered with elm trees and underbrush.

Q. How large trees? A. From thirty inches in diameter down.

Q. Are they very numerous? How numerous? A. I should say there were two hundred.

Q. What was the elevation of the meander line south of what is called the Dewitt tract on the map? A. The meander line runs about six feet above datum across this map (indicating).

Q. Were there trees where the meander line runs through on both sides? A. Yes, sir.

Q. Was there any difference in the size of the growth, or substantial elevation of the ground for some distance south of the meander line and north of it? A. No, sir.

Q. Referring you to the line running northwesterly from Wolf Lake or Hyde Lake, as shown on the map, and thirty to forty rods north from the south section line of section 20, I will ask you to state the elevations from lake to lake, taking the elevations there from lake to lake, where it stops (indicating). A. At this point (indicating), two and a half feet above datum; at this point, 2.8 above datum; at this point, three feet above datum; at this point, nine-tenths foot above datum, and at this point, six-tenths above datum (indicating on the map).

Q. How far is that line from the south line of section 20? A. About 600 feet or 650 feet.

Q. How many chains would that be? A. About ten chains.

Q. In what direction does that line run? A. Northwesterly.

Q. Is that the lowest line of levels in that vicinity? A. Yes, sir.

Q. Is there any point there where there is any timber at all? At that point, for instance, or about that point (indicating), is there timber on there, and on the continuation of it? A. There is some here (indicating); there is not much timber, small willows and birches.

Q. Twenty of them? A. Yes, sir.

Q. Growing in the water? Are they the kind that grow in the

water? A. No, there is no water there. They won't grow in water.

THE COURT: Willows he said.

Q. Willows would? A. Yes, sir.

Q. How is it as to the other timber, commencing with that point and going southerly? (indicating). Describe the timber right down to the lower part of the McDaid place. A. That is covered with small trees of wild cherry and ash.

Q. Poplar? A. Poplar.

Q. Go on, how far does it grow? A. Down to this point (indicating) where we find elm trees.

Q. Is that the McDaid place? A. It is the McDaid place.

Q. How large elm trees are there there? A. From 24 inches to 8 inches in diameter.

Q. How numerous are the trees down there? A. Quite a number. I should say 150.

THE COURT: Do you mean of elm trees or willow trees? A. Elm trees.

MR. BENNETT: The wild cherry trees are located farther north.

THE COURT: Yes, sir.

MR. BENNETT: Q. Did you notice a graded road from this McDaid place, so marked, on the northwest quarter 29, northerly, when you were down there? A. Yes, sir.

Q. Now, Mr. Shields, proceed farther south with this meander line from the McDaid place and describe the lands down to the Field house, so called. A. The southern point at the ridge, as shown by the light color on the map, down to the Field house, through this Field tract (indicating), the land is flat and uncovered with any timber with the exception of a few willow bushes.

THE COURT: Q. Down to what point? A. Down to the Field house.

MR. BENNETT: Q. What is the character of the soil? A. The soil is—

Q. What is the sub-soil? A. The sub-soil is a very tough sod that is upon a bog or sand formation.

Q. That would be the surface soil? A. Yes, sir; that is the surface soil.

Q. The sub-soil is what? A. Sand.

Q. State, on refreshing your memory from this map, the lowest elevation between those points, namely, the clump of trees on the McDaid tract south to the Field house, confining yourself to east of the railroad. A. The lowest point is five-tenths of a foot above datum.

Q. Give those elevations, commencing at the north, and going south. A. It is practically two feet and a half above datum with the exception of a strip along the east side near Wolf Lake, which is half a foot above datum, but the remaining part of the tract is about two and a half feet above datum.

Q. I will ask you whether or not on the west bank of Wolf Lake

there is not a ridge apparently thrown up by the water at some date? A. There is.

Q. Almost continuous? A. There is.

MR. GREGORY: West bank of what lake?

MR. BENNETT: Wolf Lake.

Q. Please read some of those elevations from the Field to the McDaid place, or the other way, reversing it and going from the north, or either way, only state which way you read. A. Those elevations are not shown on the map.

Q. Do you remember, independently, that there is such a ridge? A. Yes, sir.

Q. Is it pretty much continuous all the way? A. Yes, sir; it is.

Q. Does it continue north above that for a certain distance from Wolf Lake, all the way up to the south end of what was the ridge south of Smale's, or on the Field place—does that elevation continue almost all the way except here and there a break, perhaps? A. It continues up to this point (indicating). Commencing perhaps up further north than that.

Q. Give the elevations up above the Field house and barn. A. Two feet and a half, and four feet and two-tenths, and four feet and two-tenths, being the highest point between the house and the barn.

MR. GREGORY: The point to which you trace that ridge is commonly called McDaid's Point, is it not? A. Yes, sir

MR. BENNETT: Did you take any elevations along the small connection between Wolf and Hyde Lakes south of the Field house at that time on the bank? A. Yes, sir.

Q. State those please, on refreshing your memory? A. Eight and two-tenths, three and six-tenths, three and eight-tenths.

Q. What do you mean? A. Above datum.

Q. What do these figures represent—feet? A. Feet above datum.

Q. State some areas immediately to the north, immediately between the ditch and Field house and immediately to the south of it, in addition to the datum measurements you have given, if there are any on the west side? A. Areas?

Q. Elevations. A. Three hundred feet south of this opening (indicating), with an elevation above city datum at this point of eight-tenths of a foot, one and six-tenths at this point, four and seven-tenths at that point (indicating), near the section line, and three and two-tenths and eight and three-tenths near the railroad.

Q. How far south of the half section line of 30 is the locality you have just described? A. Eight hundred feet.

Q. Following the ridge from that point further south to the Reese tract, so marked on the map, give the elevations so far as they are given there. A. Four feet at this point (indicating), 6.9 at this point, 8.5 at this point in the Reese tract, and 7.7 at the south end of the Reese tract.

Q. Please state the elevations along the meander line as located from the government notes southeasterly from the northerly point of the Reese tract to the south line of section 29. A. 8ix-tenths above datum and 7.5 above datum at the south ending (indicating).

Q. 7.5? A. 7.5.

Q. Is there any elevation given near the northerly point on that map? A. None given on that map.

Q. The nearest elevations given at the northerly point of this tract—read that line of figures from east to west there (indicating). A. Six and nine-tenths feet above datum and four and four-tenths feet above datum at the northerly point.

Q. Read the elevations on the Cleveland tract, so called, commencing about opposite the ortherly point of the Reese tract and running westerly. A. 4.4 feet, 2.4 feet, 2.3 feet, 2.4, 2.7, 2 feet and nine-tenths of a foot above datum.

Q. Read the elevations on the next line of figures you have marked on the map south of that, commencing with the Reese tract. A. 4.7, 2.7, 2.4, 2.5, 2.5, 2.4, 2.3, 1.1, 1.1, and 1 foot above datum.

Q. Referring now to the southeast quarter of 19, are there any elevations given on the meander line on the Farrand tract, so called, on the map? A. No, sir.

Q. Do you remember, after refreshing your memory by your field notes or otherwise, whether you took the elevation of the bottom of the outlet of Hyde Lake westerly to Chittenden's bridge? A Yes, sir; I did.

Q. Can you state what the elevation was at the bottom of the outlet and at what point? A. 1.6 feet above datum at the point where the road crossed the ditch.

Q. In the road and west of the road? A. In the road and 100 and 200 feet west of the road.

Q. Is there a deep hole apparently washed out by the water east of the road? A. There was not at the time I made my survey.

Q. Hyde Lake, as shown on the map, isn't it surrounded by a watershed all the way around, of higher ground? A. Yes, sir.

Q. Please state how that is from your knowledge of the topography? A. There is a ridge of high ground running along the west side, following this right to the north and crossing through here (indicating) we have higher ground; and also, as the lighter color shows, high ground.

Q. Between the two lakes? A. Between the two lakes, from the east side down to the south end of the lake.

Q. Is that continuous at the south end around to the point where you commence to describe? A. It is.

Q. Do you remember the elevations on the ridge near the meander line on the southeast of 19 west of Hyde Lake, how high the elevations get there at the meander line? A. Eight and nine feet.

Q. Read the elevations, if you please, of the meander line on

the north of Hyde Lake? A. 1.3 feet is the elevation at four different points taken 200 feet apart.

Q. In getting data for this map did you figure where the section and quarter-section corners were in this tract? A. Yes, sir.

Q. In making the map? A. Yes, sir.

Q. Where are these corners located on the dry land with reference to sections 19 and 30—that is, the east half of 19 and 30—where is the section corner between 29–32, 30 and 31—indicate on the map, please? A. At this point (indicating on the Reese tract).

MR. GREGORY: Q. That is the southeast corner of the tract marked "Reese" on the map? A. Southwest corner?

Q. Yes. A. No, it is not. It is on the south line. The Reese tract extends farther west.

MR. BENNETT: Where, with reference to the meander line, west of that is the corner—how far about? A. 250 feet.

Q. What is the elevation at the section corner? A. 5.8 above datum.

Q. Can you tell us the elevation of the quarter corner of the southwest quarter corner of the southeast quarter of 30, or isn't it marked on the map? A. Not marked.

Q. Is it dry land? A. It is.

Q. Were there trees at both these corners, or stumps? A. I did not find any.

Q. How about the border corner along the northwest corner of the southeast of 30; is that high land? A. It is dry land.

Q. How is it as to the northeast corner of the southeast of 30? A. It is.

Q. Is that dry land? A. It is.

Q. How is it at the intersection of the meander line with the east and west section line of the south line of 19—that is, the Rushmore place—the intersection of the meander line, how is that land? A. It is.

Q. How is it at the intersection of the half-section line of 19 and the meander line? A. It is.

Q. How is it on the northeast corner of the southeast quarter of 19? A. It is on dry land.

Q. How is it at the crossing of the meander line with the north and south half section line between 19 and 20? A. At that point (indicating).

Q. Is it on the land? A. It is.

Q. Did you notice any trees or stumps at or near the Field house and barn? A. Yes, sir.

Q. About what size or what were they? A. There were about a dozen, I should judge, about that, of elm trees and stumps.

Q. About what size? A. Twelve inches in diameter.

Q. Was there any timber cut between the lakes and the Reese tract? A. Yes, sir.

Q. About how much and what size and what kind? A. They were white and black oaks. Most of it had been cut off before my

survey was made. The stumps were there. I should say that there were about fifty or sixty.

Q. How is it as to the immediate vicinity of the Reese tract—at the north end of the Reese tract itself? A. It is high and has been covered with black and white oak trees.

Q. You have shown here what seems to be an island on part of the McDaid tract, the east part; is that represented on the map correctly? A. It is.

Q. Between the main body of water and the island, what elevation is shown on that? A. Seven-tenths above datum.

Q. How is it with the location of the original outlet of Hyde Lake with respect to trees? A. There are trees on each side of the outlet.

Q. Very large, some of them? A. Yes, sir; large black oaks and elms.

Q. How is it as to the south of that, any trees there also? A. There are trees there, not so large.

Q. Do you know of your own knowledge, or did you ascertain when you made these measurements, that there was an Indian burying place or cemetery right there north of half-section line of 30? A. I heard that there was.

Q. Did you ever examine it? A. No, sir; I never examined it; I passed over it.

Q. You say that map is a correct representation of the land as it was when it was made, you have said that? A. Yes, sir.

Q. What was the elevation of the water when these data were gathered? A. I would like to make an explanation as to this point.

Q. Yes, sir; make it. A. This map points to different representations of water. This blue color shows the water below datum; this next darkest color shows the water when one foot above datum.

MR. GREGORY: Shows the land? A. Well, I would say either.

Q. It is land you are now touching? A. It is at present.

MR. BENNETT: It would when the map was made, wouldn't it? A. No, sir.

Q. Go on. A. This part of it (indicating) was covered with water, as the explanation on the map shows. These are contour lines; there is one at datum and one one foot above datum, and another two feet above datum, showing the amount of land that will be covered or uncovered at different stages of the water.

Q. During what period, if you are able to state, were those surveys made; if they extended over a considerable time? A. This survey extended from August 1st, 1888, until the 12th day of September following.

Q. Was any portion of that which you are talking about taken from the other map which was taken before? A. Certain measurements in order to show the location of this ridge and the elevations on the ridge were taken.

Q. Is that the map that is designated or that is in the record in the case of Mitchell *v.* Smale and others as Exhibit 4, or is it the other map that was shown Mr. Cole here? Were there two maps in the record, one referred to as the early map? A. I am not acquainted with that case.

Q. Who made the surveys, then, for that early map? A. Mr. Cole and Mr. Alvord.

Q. Mr. Cole was the active man, wasn't he? A. Yes, sir.

THE COURT: This does not represent land anyway (indicating); it does when the water—when you made your survey? A. It was not. It was covered with water at that time.

MR. BENNETT: Weren't there periods of time when you made your survey that it was uncovered? A. No, sir; not in this survey.

Q. Well, in the other map? A. In the map previous to this?

Q. Yes. A. That I could not say, because I was not present at the time that survey was made.

MR. BENNETT: I offer, your Honor, that map marked Cole, Alvord & Shields' map, 1886–1890, as Defendant Jordan's Exhibit C. (Said map is in the record, having been offered by petitioner Charles B. Shedd marked "Shedd's Exhibit Jordan's Map C.")

MR. DOUTHART: I offer it also in behalf of Mr. Cleveland.

MR. BENNETT: Q. Now, turn to the other map on which is printed the date of survey, among other things, September 26th, 1891, (Jordan's Map D) and state whether or not you were connected with gathering data from which that map was made? A. Yes, sir; I was; I had charge of the work of making the survey from which this map was made.

Q. With respect to that date, was any further time covered in that single date, was there more time before or after, or either, and how long in getting that data for that map? A. In getting the data for this map (indicating), the outlines for the map were taken from the survey of the map of 1886 to 1890. The shore line was located independently of the indication of the shore in the 1888 survey.

Q. That would not include the elevation, the representation of the water, would it? You say "outlines." The outlines you speak of would not include a representation of the water? A. No, sir.

MR. GREGORY: He said he located the shore line, as I understand him.

Q. Who were the active men in the field surveys and gathering this data besides yourself? A. Mr. Lee.

Q. What was the state of the water when the data was gathered for that map? A. It was about four inches above datum.

Q. Was that when you commenced? A. Yes, sir.

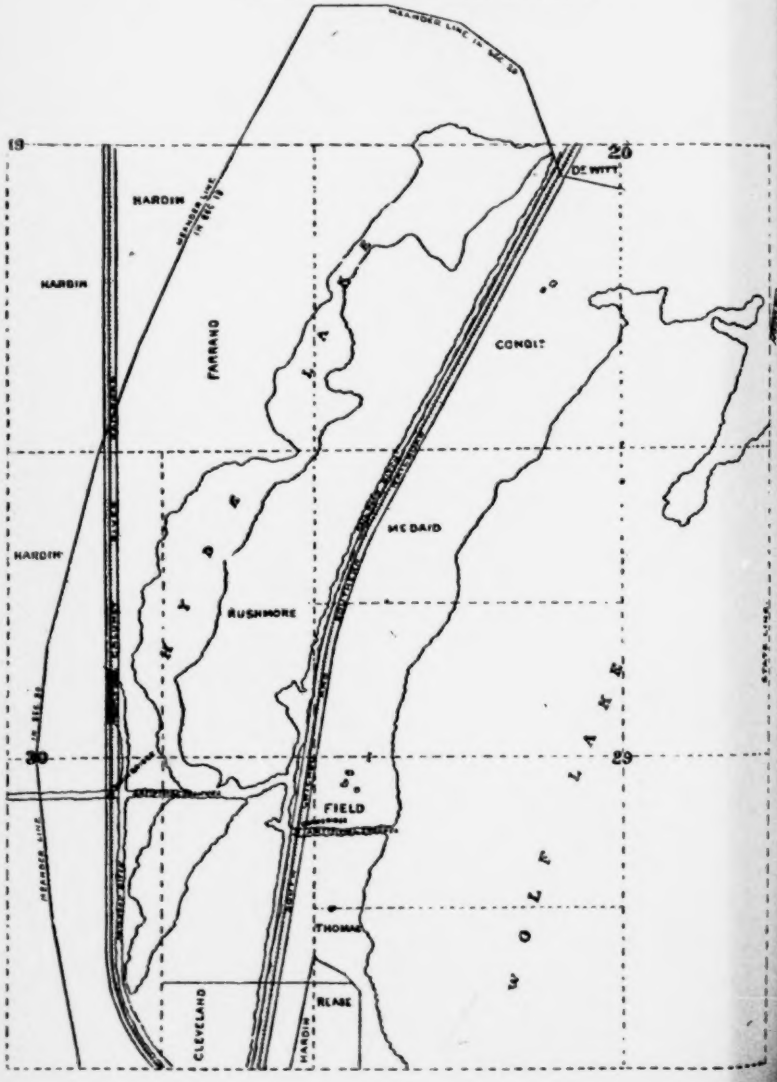
Q. How long a time were you gathering the data? A. About one week.

JORDAN'S EXHIBIT D.

PLAT OF PARTS OF SECS. 19, 20, 29 AND 30, T. 37, N., R. 15, EAST OF 3D P. M., SHOWING THE RELATIVE AMOUNT OF LAND AND WATER, AND THE SHORE LINE THEREOF.

DATE OF SURVEY SEPTEMBER 26, 1891.

Elevation of water in Hyde Lake is 0.373 above Lake Michigan. (Meaning *Datum*, See Shields' Test., Rec., 196.)



Q. Was there any change in the elevation during that time? A. Yes, sir.

Q. So far as relates to the shores and the water shown on the map, were there actual measurements along the shore? A. Yes, sir.

THE COURT: Do you understand that there is any shore line shown on these maps?

MR. BENNETT: I will use the words "marginal water" shown on the map.

MR. GREGORY: I understood the witness to say that this does show a shore line. If your Honor will notice, this is the white map, and no elevations marked on it.

THE COURT: I did not understand him to say so.

A. Section lines, and the lines from which the shore line was taken.

THE COURT: This is the shore line? (indicating). A. Yes, sir.

Q. What do you mean by shore line? A. Water line.

THE COURT: This shows the shore line at what time?

MR. BENNETT: September 26, 1891, and the number of days they were working.

MR. BENNETT: Q. Now, in ascertaining the marginal water—the margin of the water marked as Hyde Lake on the map now referred to, were there actual measurements on dry ground to determine what parts would come as the shore of Hyde Lake, at the time the measurements were made? A. Yes, sir.

THE COURT: I would like to find out if the witness made them.

MR. BENNETT: If there were actual measurements made on the dry land on the line where the marginal water is now shown on that map, I am asking.

* * * * *

THE COURT: If they were made by him or in his presence he can answer.

* * * * *

A. I assisted in making those measurements.

THE COURT: It takes more than one man to measure.

MR. BENNETT: Q. Who besides yourself and the one man you named made up the company when you were doing that?

A. Mr. Lee and three other gentlemen from his office, and myself.

* * * * *

Q. Arranged on the map—what do you say as to its being a correct representation of the amount of and location of the land and water and other objects shown on the map? A. I believe it is a correct representation of the water in Hyde Lake.

MR. BENNETT: I offer that map in evidence as Defendant Jordan's Exhibit D.

(Said map is herein inserted, marked Jordan's Exhibit D.)

* * * * *

Cross-Examination by MR. GREGORY.

Q. I understood you to say that when you made the tracing which is dated September 26th, 1891 (Jordan's Exhibit D), the surface of the water in Hyde Lake and Wolf Lake was four inches above city datum; is that correct? A. Yes, sir.

Q. Now, the map with the figures on, the years 1886–1890, on it, and which is in colors (Jordan's Map C), does not purport to show accurately the water line at any particular date, does it? A. No, sir.

Q. But these levels or elevations are given on it, so that if it is known how high above datum the water in Hyde Lake is, or in Wolf Lake, from that you can compute or tell how much of this map would be water and how much would be land? A. Yes, sir.

Q. I understood also from a note which I read on this map of 1886–1890, "The lightest color indicates highest land," that the darkest color near the blue indicates that the land is low? A. Yes, sir.

Q. Relatively to the rest? A. Yes, sir.

Q. And the white spots we see, or strips, on the map, indicate the highest land? A. They do.

Q. Now I notice these levels are taken apparently at regular intervals and in east and west lines, in southwest of 20.

THE COURT: Regular intervals, north and south, do you mean?

MR. GREGORY: Yes, sir, regular intervals, north and south.

THE COURT: But on a line east and west?

MR. GREGORY: On a line east and west.

Q. Those east and west lines seem to be at regular intervals What is the distance between those east and west lines supposed to be? A. The levels were taken two hundred feet apart on the lines east and west, and the lines are three hundred and thirty feet apart north and south.

Q. Wasn't it three hundred and twenty? A. Three hundred and thirty.

Q. Isn't it one hundred and sixty rods, for instance, from the middle line of 20 down to the south line of 20? A. Yes, sir.

Q. And then there are eight of those spaces, aren't they; perhaps that would be three hundred and thirty; they are twenty rods apart, aren't they? A. Yes, sir.

Q. And just north of the first one of these east and west lines, which is north of the south line of 20, the ridge is darker in color, isn't it? A. Yes, sir.

Q. Then at points just north and just south of that? A. Yes, sir.

Q. And that, I believe you said, indicated a kind of natural depression in which were growing willows and bushes? A. Yes, sir.

Q. I will ask you to state whether or not from the appearance of that depression it would be your opinion that water had formerly flowed through there between the lakes?

Objected to by Mr. Bennett as calling for the opinion of the witness.

THE COURT: A surveyor ought to be an expert on that.

MR. GREGORY: Q. All the surveys were made a great many years ago and we can only get at the state of affairs approximately? A. At high stages the water would be over that lower portion, but I know of no reason why there should be a current through it.

Q. It would be over so there would be connections in that way between the two lakes? A. Yes, sir.

Q. The south boundary of that depression would be only a little over twenty rods north of the south line of the section, wouldn't it? A, It is about thirty rods.

Q. Now, I want to call your attention to a break in the narrow strip of white on this ridge which is south apparently, about ten rods south, of the south line of 20, and ask you to state what that indicates? A. It indicates an opening through the ridge, evidently made by artificial means.

Q. How are you enabled to state that that is an artificial opening in the ridge? A. Because all other openings in that ridge are low and wide. This is narrow and the trees are growing right up to the edge of the opening.

Q. Now passing down south of McDaid's place there is between that and the middle line of section 29 a considerable space of low ground, I believe, to the south? A. Yes, sir.

Q. I will ask you to state whether or not in high stages of water there would not be communication between Wolf and Hyde Lakes through that low ground or over that low ground?

THE COURT: South of McDaid's place?

MR. GREGORY: South of the McDaid place.

THE COURT: North of Field's?

MR. GREGORY: North of Fields.

A. In extreme high water there would be; it would be covered with water.

Q. Now, in other words, Mr. Shields, as I understand the topography of this strip of land in between those two lakes, there appears to have been a kind of a ridge running from the Dewitt place up the north line or the middle line of 20, in a southwesterly and southerly direction to the south line of 29, and which is shown on the map as the Reese place, in which there were two breaks, one near the south line of 20, and another, and a much more considerable one, at the south of McDaid's place and north of the center line of 29; is that true? A. There is that depression.

Q. Two depressions, aren't there? A. Two depressions.

Q. And that through those depressions in high stages of water the water might pass between the two lakes; is that correct? A. It could.

Q. Now, how long is it since you have first known this region about Hyde and Wolf Lakes? A. Since the winter of 1883 and 1884.

Q. Have you noticed any tendency there for the water to recede from those lakes; in other words, does the land seem to be gaining on the water, or not, with the lapse of years? A. Yes, sir; it does.

Q. To what do you attribute that? A. (Hesitates.)

Q. Well, I will ask you to state whether, in your opinion, the deepening and improving of the Calumet River by the government has had any influence upon that region? A. No, sir; I don't think so.

Q. Wouldn't it enable an increased flow of water to pass off and drain this region which otherwise might drain into Wolf and Hyde Lakes; wouldn't it drain out better that way? A. I don't think it would to any extent.

Q. Well, what do you attribute it to—to natural conditions? A. There is a great deal of rushes and heavy grass and reeds that grow in the lake every year, and these falling and accumulating are filling up the lake. In 1888, when I made the survey, locating the shore line on the west side, I waded through the lake to the west shore and located it in that manner. At that time there was about 1,500 feet, I should judge, in one place that I was unable to walk over, and in my survey of this year I could walk over the entire tract without any trouble whatever.

Q. Why couldn't you walk over it then; was the water too deep, do you mean? A. It was so boggy and so soft, it would not hold my weight.

Q. Do you know how large a stream the Calumet river is here (indicating), say in section 19, where it runs through? A. It is about 60 feet wide, I believe.

Q. About what depth? A. I don't know what depth. I never had an opportunity to ascertain.

Q. Do you know how deep it is a little farther north? A. I don't.

Q. Has the Calumet river a current? A. It has.

Q. In which direction? A. To the north.

Q. South Chicago is situated near the mouth of the Calumet River, I believe? A. It is.

Q. Do you know how far up the river it is now navigable for lake vessels? A. I don't at present.

Q. You spoke of this piece of land on the margin of this map, 1886—1890 (Jordan's Map C), as being an island—is it an island? A. It is at present.

Q. It is at present? A. Yes, sir.

Q. You see on the other tracing of September 26, 1891 (Jordan's Map D), it seems to be delineated as the end of a kind of a cape running out into the lake? A. That is right.

Q. Do you say it is an island or is not now? A. At the time that was made?

Q. At the time which was made? A. The first survey was made.

Q. Which was the map of 1886-1890? A. Yes, sir. It is in the form of an island.

Q. That is, there was water to the east of it? A. Yes, sir. At this time that narrow neck that is shown there seems to have widened and made a connection with the point that projects down towards it.

Q. You say this map here in colors, 1886-1890 (Jordan's Map C), was not intended to delineate the land and water just as they appeared at any particular period; but I will ask you to state whether or not it is not now approximately a correct sketch of the way the land and water was this fall or summer. A. It is.

Q. That is, there might be some changes in the shore line, but in a rough way it gives a pretty good idea of the situation this fall and summer, doesn't it? A. Yes, sir.

Cross-Examination by MR. DENT.

Q. I see, looking at this map in colors, Map C, it appears to show the topography and contour lines of these certain elevations; what are the contour lines, and can you explain that any? A. The different colors show the different elevations between the foot points. For instance. from datum to one foot below datum the surface is represented in the dark color. From datum to one foot above datum the surface is represented by the darker color of brown From one to two feet it is a lighter shade. From two to three feet still lighter, and the shade is made lighter for each foot in the elevation.

Q. There is next to the blue portion a broad border on the east that is a foot above datum, as I understand it? A. That represents that part that lies between datum and one foot above datum.

Q. And on the west there is also a border, west of Hyde Lake, which is in the same color, particularly near the northern part or half of the map, and that is intended to represent ground that is not more than one foot above datum, isn't it? A. Yes, sir.

Q. And the blue part is intended to represent the water at one foot above datum?

THE COURT: That is what he said. A. At datum, and one foot below datum.

MR. DENT: Q. Now, I observe that on this map, somewhat below the half section line, section 19, 20, the figures indicate datum or below datum from the blue marked "Hyde Lake" almost over to the railroad on the east, in four places; also on the first tier—that was the second I was speaking of—on the first tier it is only one-tenth of a foot, in some places above datum, and in some places two-tenths below, and one-tenth below at datum; wouldn't that indicate this place would be covered with water if the water stood at datum (indicating)? A. I was mistaken in my description of the map. I should have said that blue represented below datum, from datum to below datum. There is a certain plane the water reaches; if it is at datum it will cover that ground or reach to the ground.

Q. If the water were at datum wouldn't it cover this darker

strip (indicating) pretty much entirely? A. It would have to be above datum in order to cover it.

Q. Would not have to be much above datum? A. No, sir; very little.

THE COURT: Q. Would it have to be above datum to cover it? A. Yes, sir.

Q. Would not cover it if below datum? A. No, sir; the level of the land is at datum.

MR. DENT: Q. I pointed at the figures which are just at datum, I believe, all the way across this strip—isn't that so? A. Yes, sir.

MR. GREGORY: Not quite across; there is one there four-tenths of a foot.

MR. DENT: This is pretty near to the railroad, I mean, nearly all the way across it.

Q. That would be covered with water if the water were at datum, pretty much, this strip (indicating), where it is marked in that way? A. No, the water would have to be above datum in order to cover it.

Q. But if slightly above it it would cover it pretty much? A. It would have to be above it to cover it.

Q. How much above? A. A very small amount.

Q. Have you observed the water at different stages? A. Yes, sir.

Q. At what stages? A. In 1888, when a survey was made, the water was one foot and ten inches above datum.

Q. Do you remember any other period? A. In 1884 the water was 2.05 feet above datum. In 1883—in the winter of 1883 and 1884—the water was three and a half feet above datum, or rather the top of the ice.

Q. Was that the time you and Mr. Cole were surveying, in the winter of 1883-4? A. No, sir.

Q. When the meander line was surveyed? A. No, sir; it was the time that Mr. Williams and Mr. Cole made their survey for the Hyde Park drainage report, in which I assisted.

Q. Where did you take the level then of the water? A. In Hyde Lake.

Q. Well, that would practically cover, wouldn't it, a great part of this strip that is west of the railroad, or most of it appearing on this map? (indicating). A. It would cover the darker shade of that part.

Q. Wouldn't it also cover what is between the two lakes, those depressed points you spoke of when Mr. Gregory examined you?

MR. GREGROY: What stages of the water are you referring to?

MR. DENT: High stages of water.

MR. GREGROY: The highest in 1883?

MR. DENT: The highest stages of water he mentions.

THE COURT: In 1883 three feet and a half.

MR. DENT: That is the stage I mean.

A. I don't remember the elevation at that point.

Q. You cannot give an answer? A. I think not; not at this point (indicating).

Q. Well, at the other point? You spoke of two depressed points?

THE COURT: Two depressions? A. At this point it would (indicating).

THE COURT: Q. That is the McDaid? A. That is the McDaid.

MR. DENT: Across the McDaid tract? A. Yes, sir.

Q. That is the wider one, is it not? A. Yes, sir.

Q. The wider depressed point? A. Yes, sir.

Q. Do you mean, by suggesting the contour lines, that this dark space is a foot higher than Hyde Lake at datum, than Hyde Lake is at datum? A. No, sir.

Q What do you mean by that? A. It has an elevation of from one—from nothing to one foot above, ranging from nothing up to one foot.

Q. Parts of it are not above at all? A. It is at or about datum.

Q. Some of it is at datum and some below? A. Some of it is at datum. None of it below datum.

Q. None of it above more than one foot above datum? A. No, sir.

Q. Now, then, if the water was at three and a half feet above, there was very little left even of this white ground there between the two lakes (indicating), that is what is marked white and whitest on this map, Exhibit C; there wasn't very much left of it, was there, above the water or out of the water? A. Well, the long grass which grows on that part of the tract covers the water, and it is hard to tell how much would be covered, with the eye. At that time I was not interested in the tract whatever, and did not take any notice of how much or how little was or was not covered.

Q. There is high grass growing along there in this strip that is marked in the darker colors, and in the next darker color also, isn't there, right across the map, from the northeast along the railroad or near the railroad, high grass growing all the time, isn't there, nearly? A. In certain sections of it where it is not pastured.

Q. Has the pasturing of it made a difference? A. It has.

Q. Doesn't it grow pretty much all the way along there, and isn't there high grass in the depressed parts you have spoken of, the depressions in the ridge? A. Not in the ridge.

Q. But between the two lakes, didn't the high grass grow all the way across in places? A. No, sir.

Q. Where, and where does it stop? A. (Indicating.) It stops at an elevation about three feet, the tall grass. Of course there is grass that grows over the entire ridge, but not the swamp grass.

Q. The space east and west that is not covered by that tall

swamp grass is very narrow, isn't it, in places, a very narrow strip? A. The narrowest that I remember about this point (indicating).

Q. That is across the McDaid tract? A. Across the McDaid tract, which I should say was three hundred feet.

Q. Does not the tall grass grow across the Field place and Rushmore place between the two lakes, from lake to lake? That is, where I am pointing my pencil now (indicating)? A. It does farther down, across here (indicating).

Q. And that is about half way between the south line of section twenty and the half section corner—or half section line, rather—of section 30, 29? A. About two-thirds to three-fourths of the way down.

Q. It grows all the way across between the two lakes? A. Yes, sir.

Q. How did you come to select datum as illustrative in making this map? Did you find the water at any time just at that stage? A. No, sir. It is the usual method in running contour lines to place them at an even number of feet above or below a certain fixed plane which we call datum.

Q. This map then in colors is somewhat conjectural, or must be somewhat conjectural as to the shape of the lakes? You could not say that any special time the lakes were just in that shape, could you, and just of that contour? A. No, not any special time; yet the shape of the lake would be in proportion to the elevation of the water, and will be the same as represented on that map.

Q. Do you mean when the water gets down to datum that it will assume the shape that is shown on that map? A. Practically; yes, sir.

Q. Practically so? A. Yes, sir.

Q. Comparing the two plats C and D, which are just now before you, does not the plat D, which is not in colors, show the lake at a still lower stage or apparently with much less water? A. Yes, sir.

Q. How do you account for the fact, then, that the plat D, which is not in colors, was taken, as you say, at four-tenths above datum?

THE COURT: Four inches? A. Four inches.

THE COURT: He said four inches above datum.

MR. DENT: Q. Yes, at four inches above datum? A. The elevation of the water at the time this map was taken, was taken at that point (indicating) from a bench mark we established on the bridge. On this tract through here (indicating) the water was on the greater part of it from one to two inches deeper, and the evaporation during the hot weather that we had at that time would account for the difference, in my opinion, which is very great over that large extent with sand bottom.

THE COURT: Is that why you took it four inches above datum? A. No, sir. We took the level of the water as we found it.

MR. GREGORY: Took the level of the water in the cut between the two lakes? A. In the deep cut; yes, sir.

THE COURT: And that was four inches above datum? A. And that was four inches above datum, practically.

MR. DENT: Do you mean to say, then, that you ran a meander line along the west side of Hyde Lake in water that was four inches deep? A. No, sir.

Q. The water was four inches deep at the time you made the measurement there; was that the time when you ran the meander line? A. The meander line was run from this point (indicating) through here. At the time that this was made this part (indicating) was practically shut off from the deep channel, and the evaporation —the amount was very considerable—and there is no connection with the deep water, and the water in the—

Q. I don't understand you. You say the water in the lake was cut off from communication on the east? A. At this point (indicating).

Q. And the west, too? A. Yes, sir.

Q. And then evaporation occurred? A. Was occurring constantly.

Q. How? A. It was occurring constantly.

Q. And reduced the level of the water while you were at work? A. At this point (indicating) below where it was on that point (indicating). We did not take the level of the water at this point (indicating) when we made our surveys.

Q. Is that your explanation of it? A. That is.

Q. That is why you represent that lake so much smaller? A. Yes, sir.

Q. Then it was in point of fact when you commenced your survey? A. That is the way I account for the difference.

Q. When you commenced your survey the lake spread over pretty much that ground up pretty close to the railroad, didn't it? A. No, sir. When we finished our survey at these lines (indicating) the water had receded from fifty to one hundred feet in some places from our lines that we show on this map, during our survey (referring to Exhibit D).

Q. Weren't there those cuts, however, that caused communication between Wolf Lake and the Calumet River which would have prevented evaporation of the lake in the way you suggest? A. No, sir; I think not, for that water here (indicating), it was very shallow, so choked with reeds and rushes, and along the north side of this cut through here (indicating), you could walk from one end to the other. There was no connection.

THE COURT: Q. What cut are you referring to? A. The one that was made through here with a dredge (indicating).

Q. Well, how is that cut? A. It is about six feet deep and about twelve feet wide, I believe.

MR. DOUTHART: Do you mean the cut between the Calumet River and Hyde Lake?

THE COURT: No, the railroad cut.

MR. GREGORY: Q. The cut you refer to is that which was dredged there between Hyde and Wolf Lakes, isn't it. A. Yes, sir.

MR. DENT: Q. You mean to say that cut is no deeper than the water in Hyde Lake? A. No, sir; I don't.

Q. It in point of fact is deeper? A. It is about six feet deep. In making that cut, in dredging out the material, they threw it on the north side of the cut, and formed an embankment along there so at the time the survey was made we could walk across the lake.

THE COURT: Q. Across Hyde Lake? A. Across Hyde Lake, shutting off the connection of this part of the lakes with the channel (indicating), which would supply or keep the north part of the lake at the same level.

MR. DENT: Q. You mean to say, now, don't you, when you made that survey the water was not four inches above datum? A. It was at this point (indicating). I don't know whether it was—

THE COURT: Q. At the cut? A. At the cut, yes, sir.

MR. DENT: Q. At the beginning of your survey it was four inches above datum? A. Yes, sir.

Q. But before you closed your survey it had run down very much? A. Not in the channel; but it had in this part of the lake, which was not connected with the channel (indicating.)

Q. How did you fix this figure here "Elevation of water in Hyde Lake is .373 feet above Lake Michigan"—how did you get that figure? I have this also from this notation on this map D, "Elevation of water in Hyde Lake is .373 feet above Lake Michigan"—I will ask you how you got that? A. It was taken from a bench mark which we had established at the bridge, crossing the cut south of the Field house.

Q. How did you know what was the height of water in Lake Michigan at that time, or did you mean to refer to that? A. On referring to the datum plane which we carried down in our survey of 1883 from the benches in the city of Chicago to this point, and established those points from which we made our measurements.

Q. You don't mean by that, now, what the note says, that the water in Hyde Lake was so much above Lake Michigan? That is not what you meant, was it? A. That is not correct. It should have been above datum.

THE COURT: Q. You mean above datum? A. Above datum.

MR DENT: Q. That map purports to represent parts of sections 19, 20, 29 and 30—the last one I am speaking of, map D—now why didn't you give the outlet or connections of those lakes with other waters? A. The connection is shown from this point (indicating).

Q. Why didn't you show the natural outlet or depression—isn't there a natural outlet or depression? A. Not at present. It is filled up.

Q. Where was that? A. It came through this part here (indicating), meandered through here, crossing the section line about 600 feet north of this corner (indicating).

Nov. 11, 1891, 10 A. M.

Court met pursuant to adjournment.

Re-direct Examination of the witness Shields continued by MR. BENNETT.

Q. Mr. Shields, on cross-examination by Mr. Gregory, it seems to be claimed that there was a depression in the lands between Wolf and Hyde Lakes, on a line some thirty rods north of the south section line of section 20, running in a northwesterly direction. Did you examine the soil of that locality at any time, and could you state what the soil is? A. It is sand.

Q. What is the surface soil above the sand? A. The surface soil is loam.

Q. About how deep? A. About twelve inches deep.

Q. As much as that there? A. About twelve inches deep on the east side.

Q. Have you reference when you say twelve inches to this locality, over west? A. The east side.

Q. How far east? A. About that point.

Q. About where it is claimed there is a parting of the ridge? A. The east side of the ridge at this point.

Q. Where the dark place commences? A. At this point.

Q. How is the depth of that soil east of that, towards Wolf Lake? A. I did not examine further east than that.

Q. Would you say it was more than four or five inches? A. I couldn't say.

* * * * *

Q. Now, Mr. Shields, what effect did the cutting of this new outlet by the dredge have upon the water of Hyde Lake?

MR. DENT: If any, if he knows. I don't know whether he knows.

* * * * *

MR. BENNETT: Q. As a matter of fact would the waters rise temporarily and cover the marsh lands to the west of Hyde Lake, and including the Farrand tract, where you say the rushes have been decayed, as much, or not? A. It would rise more rapidly.

Q. After the cut? A. After the cut.

Q. Rise in the lake more rapidly? A. Yes, sir.

Q. Why? A. The water from the river would find its way in more quickly.

Q. When? A. During the time of high water in the river.

Q. That I didn't ask you. But I will ask you the question whether the waters of Lake Michigan—when the waters of Lake Michigan were lower than the waters in Hyde Lake, what effect

did that cut have on the waters of Hyde Lake? A. It would have the effect of reducing the height of water in Hyde Lake.

Q. Would it have the effect of keeping that elevation and preventing the temporary overflow on the marshes of Hyde Lake? A. Yes, sir.

Q. What effect would that have upon the solidity of the ground upon the Farrand piece, would it become more solid? A. It would depend upon the elevation of Lake Michigan.

Q. Well, take it for the last year, your knowledge of the elevation of Lake Michigan, would have the effect of solidifying the land that you say was first made land? A. Yes, it would.

Q. So that you could walk over it? A. Yes, sir.

Q. Would not that explain why you could walk over that this last survey and not before, without reference to the question of decaying vegetation? A. It would to a large extent.

* * * * *

Re-cross Examination by MR. GREGORY.

Q. Did I understand you to say, Mr. Shields, that in your opinion the water could not, or never had, flowed through this depression in the southern part of the ridge north of the south line of section 20? A. No, sir; you did not.

Q. I understood you to say to me that in high water it would stand in that depression? A. Yes, sir.

JUDGE PRESCOTT: I understood him to say in reply to a question asked by Judge Bennett that he could not get across there in high water.

THE COURT: You misunderstood him.

* * * * *

Re-cross Examination by MR. DENT.

* * * * *

Q. The map, Exhibit D, as well as the map, Exhibit C, if I understood you rightly, were both made up to represent the surface at different periods of time? A. Yes, sir.

Q. Running back during your whole experience in surveying there in this locality? A. No, you misunderstand me. This map was made from an entirely separate survey.

Q. You are speaking now of C? A. Yes; made in 1888 during the months of August and September. This map marked D, the survey was made in 1891, and was taken from the same base line as the survey made in 1888. The survey of 1888, these section corners and quarter corners, were all located, and monuments planted at the corners, which monuments and lines were used in making this survey, Exhibit D.

* * * * *

Q. Now, you have seen the water in Hyde Lake, as I understand, three and one-half feet above datum? You so testified yesterday? A. Yes, sir.

Q. Now, that being so, would not the water overflow all this

space that you have last been speaking of, looking at the map, Exhibit C, where the elevations are shown at 2.17 and 3 feet, 2.1 and .7, between Hyde Lake and Wolf Lake, would not the water overflow all those spots? A. It would overflow all below that depth of three and a half feet.

Q. That would cause an overflow of nearly all this ground from the point of this ridge on the south, south of the Condit house, down to the McDaid place, wouldn't it? A. No, sir; there is some—there is more of a ridge thrown through there than that indicates.

Q. I understood you to say that you noticed—looking at the map, Exhibit C—that there was something like a rim or border along Wolf Lake, running from the Field place up towards the McDaid place next to the colored line marked Wolf Lake in blue, and also further west another rim of water as far as you located up north; is that correct? A. There was only one.

Q. Which one was that? Where was that located on the map? A. It was about a foot above datum through there.

Q. That would be some ways then, a number of feet west, as shown on that map of Wolf Lake, the rim or border that you spoke of? A. Yes, sir.

Q. That is near or approaching the whiter or lighter shading? A. It was about parallel with this line at the time this survey was made, the water was about two feet above datum, and it would bring the water to about this point near where a small ridge was thrown.

Q. When the survey for this Exhibit C was made up, the water was about two feet above datum? A. Yes, sir.

* * * * *

FRANK SCHOLES, recalled on behalf of the South Chicago and Southern Railroad Company, testified as follows:

Direct Examination by Mr. LOESCH.

Q. The other day, on cross-examination, you said that the level of the water in Hyde Lake, or near Hyde Lake there, was six feet above city datum in the summer of 1886. Do you wish to make any corrections as to that? A. Yes, sir. I made the statement from reference to the looks of the map here, and memory, as I could not get at my level notes that day, and to-day I have obtained my original level notes and have made the corrections.

Q. You can state what the level of the water was above city datum as you find it from your level books now. A. Yes, sir. The highest water record that year was taken the last of May—I have not the exact date—is 3.68 above city datum.

Q. 3.68 feet? A. Yes, sir; 3.68 feet.

Q. The later part of May, 1886? A. 1886. The lowest water that I have any record of that year—I do not say it is the

lowest there was that year—but the lowest I have any level of was 2.25 feet on the 3rd of November, 1886.

Cross-Examination by MR. GREGORY.

Q. Is that the level of the surface? A. The surface of the water was 2.25 feet above the city datum.

Q. Both of these levels refer to the surface of the water, not the elevation of the bed of the lake? A. The elevation of the water, I said. Of course that is the surface of it, the height of the surface of the water.

Q. Did you give those figures in your testimony, that you thought it was six feet above datum? A. Yes, sir; I testified that day from memory entirely, as I could not get my level notes.

Q. Have you any impression as to whether the water was higher earlier in the spring than it was in May when you took your observation? A. Yes, sir.

Q. It was higher prior? A. It was higher.

Q. That is, it was higher than 3.68 feet? A. Yes, sir; it was slightly higher than that.

Q. Somewhat higher than that? A. Not very much.

Q. I believe you said that a couple of dredges proceeded up Hyde Lake at that time, one drawing about 4½ feet and the other about 5½ feet of water?

THE COURT: Are you going to open up this evidence again?

MR. GREGORY: No. I just wanted to ask him as to that point. I thought that it might be material. His testimony the other day was that the water was six feet above datum, and the testimony did not strike me as much out of the way, but it seems that it was. Now, I want to call his attention to the other statement that he made, with a view to getting at the depth of water in Hyde Lake.

THE COURT: Very well.

MR. GREGORY: Q. As I remember, you said that you had some dredges at work there? A. Yes, sir.

Q. And you said that one of them went up Hyde Lake, commenced at the north end of the ditch? A. Yes, sir.

Q. Do you remember what that dredge drew in the water? A. It drew over 4 feet of water.

Q. Where was the other dredge put to work?

MR. GOUDY: He went over that the other day.

MR. GREGORY: Q. Was it 4½ feet or 4 feet, or don't you remember?

THE COURT: You went over that.

A. It was over 4 feet. I won't say exactly. They say that dredge drew about 4 feet and a half of water and the other was deeper.

MR. GREGORY: I thought this: it might be contended that as the witness made an error on some of his statements that other statements made by him, if his attention was not called to that matter, were equally erroneous.

A. I have the exact height of the water when that dredge went up there, if that is what you want to know.

Q. The exact height of the water? A. Yes, sir; above datum; the day it turned up there.

Q. Well, you might give us that. A. It was 2 feet and 80/100.

Q. 2 feet and 80/100? A. Yes, sir.

THE COURT: Q. Where? A. In Hyde Lake.

MR. GREGORY: Q. Whereabouts did you take that level, do you know? A. At the north end of Hyde Lake.

Q. At the north end of Hyde Lake? A. Yes, sir.

Q. That was 2 and how much? A. 2 and 80/100 in that arm of the lake running off in there near the line of section 20.

Q. Did you make any soundings? Have you any data as to the depth of the water there in the lake? A. I suppose I have them, but it would take sometime to look them up.

Q. Do you mean you have them in that book before you? A. Yes, sir.

Q. Just glance at it and see if you can find it. A. The water, 60 feet—I won't say as to whether that plat is correct or not—but the water 6 ' feet west of the center of our right of way at station 102, plus 80, was 4.2 feet deep.

Q. How far north is that? A. Well, I don't know. I can't locate it—this is my level book and I did not keep the line.

Q. Have you any other soundings? You now refer to the point where the lake leads into the ditch as shown on this tracing? (map marked "D"). A. Yes, sir.

Q. Near the DeWitt tract? A. Yes, sir.

Q. Have you any other soundings or measurements as to the depth of water in Hyde Lake at any other points? A. No, sir; only along my railroad right of way, and that is largely out of the lake, as you see.

Q. That is, you mean that it was dredged out? A. I did not sound the lake generally, only as I surveyed and leveled the line of railroad.

Q. When was it you measured that? A. I have it dated here July 13th, 1886.

Q. Was that before there had been any dredging done there? A. Yes, sir.

Q. You say you have not any soundings or measurements of the depth of the water? A. Not towards the western part. I know that it is deeper than the eastern part, but I have no soundings.

Cross-Examination by Mr. DENT.

Q. Have you the water-levels of some days between May and November, 1886? A. Yes, sir.

Q. Can you readily give some of them, or give us an idea about what was the average level between May and November? A. September 24th it was 2.90 feet. Now, I will simply read these

as I took them to the nearest tenths. In railroad engineering we do not go into the thousandths.

THE COURT: Q. September when? A. September 24th, 189 , 2.90.

Q. 2.90? A. Yes, sir. July 19th, 1886, I have just 3 feet. July 28th, 3 feet; August 9th, 2.80. I suppose that will be sufficient.

MR. DENT: Q. Can you go back now to June and July, or to June, rather. You have two dates in July? A. I was not doing any leveling there in June. I was building, working farther north. I think I testified the other day that this just barely commenced the latter part of July, and proceeded on the rest of the fall. These last levels were all taken in Hyde Lake. One of the former levels was taken at the edge of Lake Michigan.

THE COURT: Q. The levels were all taken in Hyde Lake? A. Those that I have just been giving you were all about at the water level in Hyde Lake.

* * * * *

THOMAS GAUGHAN, called as a witness on behalf of defendant Conrad N. Jordan, was duly sworn and testified as follows:

Direct Examination by MR. BENNETT.

Q. Please state your name? A. Thomas Gaughan.

Q. Where do you live? A. I live now at Cheltenham.

Q. Where did you live prior to living in Cheltenham. A. I have been living for the biggest part of my life at what they call the mouth of what they call the Little Calumet, where it is now called South Chicago, where the light-house stands; that is, the inside light-house.

Q. How long ago or in what year did you commence to live there? A. Well, I commenced—my father came from Rochester, New York, in the year 1835.

Q. When did he come to South Chicago, or Little Calumet? A. It was called the Little Calumick.

Q. Calumick? A. Calumick or Calumet, it is all one thing.

Q. When did your father come to South Chicago to live, or Little Calumick? A. I say in the year 1835.

Q. In 1835? A. Yes, sir.

Q. Have you lived in those two places ever since that time, that is, at South Chicago and Cheltenham Beach, where you live now? A. Yes, sir; except some of the time I lived in Chicago right here. I worked in Chicago some years ago, but you might say at Calumet most of the time.

Q. How early did you become acquainted with the locality of Hyde Lake, Wolf Lake, and the surrounding lands? A. Well, it is over half a hundred years ago: over that.

Q. How early after your father came to South Chicago, or the mouth of the Little Calumick, did you become acquainted with this

country down there? A. Well, I was quite a boy when I came there. I suppose you might call it in the year 1840, the year Harrison was elected,

Q. Was you down there before that? A. Yes, sir; I knew it before, but I commenced hunting, you might say, before that.

Q. Have you, since that time, been acquainted with the body of land, if there is land, between Wolf and Hyde Lakes? A. What is called Hyde Lake now, or you mean that ridge?

Q. That ridge? A. Yes, sir; I am acquainted with it. I ought to be. I drove deer enough across there.

Q. What did you do soon after your father came to South Chicago? What did you do in those days, those early days? A. Well, times at that time was rather dull. Did fishing and hunting.

Q. Did you fish and hunt then? A. Fish and hunt; yes, sir.

Q. Did you fish and hunt in what is now known as Hyde Lake? A. Yes, sir; hunted in all them lakes, and fished in them.

Q. At that time were what is now called Wolf and Hyde Lake one or two lakes? A. They were all each lake by itself, but at that time they were called no lake. Afterwards Hyde Lake—what is called Hyde Lake now was called Indian Lake, but no names, there was no name at all. Anybody ask you if you were going hunting and you would say you were going up there to the lakes. None except the Calumet Lake.

Q. That is another lake? A. Well, I was just mentioning the lakes.

Q. How early did what is now known as Hyde Lake take the name of Indian Lake, if you remember? A. Oh, about the year 1842.

Q. Why was it called Indian Lake, if you know? A. Well, the Indians had an Indian village on the bank of what is now called the Indian Ridge. There was an Indian village there.

Q. Was that on the west side of Hyde Lake? A. It was on the west side of Hyde, on the bank of Hyde—called Hyde Lake now.

Q. Do you know what tribe of Indians had a village there? A. Well, there was several tribes, but the regular tribe was the Pottawattamies and the . The language was very little different. There was every kind, you might say, but that was the Indian village there, and there was an Indian chief, Mezekah. There was several chiefs, but he was the biggest one.

Q. About how numerous were the Indians there at that time? A. Well, you might say very numerous.

Q. About how many of them would there be there? A. When we first came to South Chicago and Calumet regions, if I would say as thick as the grass it would be too thick, but they were very thick. Couldn't go out without seeing an Indian or a squaw.

Q. Did you fish and hunt with the Indians in those days? A. I fished and hunted with the Indians, and camped where the Indians camped.

Q. What was the last? A. I camped with the Indians, hunted with them, and slept in the wigwams.

Q. Where did you fish and hunt? A. Well, I fished and hunted all over, through the woods.

Q. Did you fish and hunt in Hyde Lake and vicinity? A. Yes, sir; all around Hyde Lake, and this ridge that runs across—it was not called the ridge—where the deers run. It was the run for the deers.

Q. Did you in those early days go across this body of land between the two lakes, what is now called Hyde and Wolf Lake? A. I did.

Q. How early? How early a year? A. Then I was quite young, but I might have crossed it in 1838, but that I would not say. I will say in 1840 and 1841, or before 1840, a year or so before 1840.

Q. How frequently have you been in the habit of going across and seeing that ridge from that time? A. While I would not be in Chicago it might be every day. That was my hunting ground, except up the Calumet River. Sometimes I would go up there where Hegewisch is now—beyond Hegewisch—up the Grand Calumet, clean up to the mouth, clean up to the mouth of the Grand Calumet, I mean.

Q. When you first saw and went across this body of land between Wolf and Hyde Lake what was the condition of the timber on it, if any? Describe it as to timber? A. Well, the timber—

Q. Commencing at the north end, if you please? A. Do you want me to describe what kind of wood there was on it?

Q. Yes, and what the size of the trees was, and how thick they were, and all about them, and where they were? A. Well, from the north end of what is called Hyde Lake now there were several kinds. There were burr oak and swamp oak, ash, elm and willows.

Q. Was that at the north end you are speaking of now? A. North and clean through.

Q. Clean through? A. Clean through. At the very north end it was mixed up.

Q. Was there as much, or more, or less, timber then, than there is now there on that divide between the lakes? A. It may be of course a little less now because it has been cut off. With the exception of the cutting off I don't see much difference. There was basswood.

Q. How large were the trees on this land between those lakes when you first knew the land? A. Well, there was some basswood trees there, I think would go near twenty or twenty-four inches across in diameter—and poplar; there was poplar there I would say ten—about thirteen inches. Charlie Reese and me measured them afterwards.

Q. How was it as to elms? Were there any elms? A. Yes, sir.

Q. How large were they? A. I think they growed maybe twenty or twenty-four inches.

Q. Where did they grow, on this land between the lakes? A. How large?

Q. Where, at what place? A. They growed on this ridge between Hyde Lake and Wolf Lake.

Q. In more than one place? A. All along there, out where Hegewisch is now. They used to call it Hickory Point in them days.

Q. Where was it, south of this ridge? A. That is the ridge between the two lakes, between Hyde Lake and Wolf Lake.

Q. At what particular point was the place called Hickory Point? A. Well, there was not much hickory there, but on account of what little hickory was there where Charlie Reese lived we called it Hickory Point.

Q. Down near where Charlie Reese lived, was it? A. Well, all through it was called Hickory Point, but Charlie Reese in particular. That was the name of that ridge.

Q. Do you know where Mr. Field lived at one time? A. Who?

Q. Mr. Field? A. Yes, sir.

Q. Did you ever hear that place called Elm Island? A. Elm Island?

Q. Yes, sir? A. No.

Q. Was it ever in fact an island? A. There was no such island there, unless they got a new name. I can't tell you. I don't know nothing about it nowadays, about the new names. I call them the old names.

Q. You say there was game in those days in that locality? A. Yes, sir; there was plenty of it.

Q. What game, if any, was there on this tract between the two lakes? A. Well, that used to be what they called the runway of the deer, and there was game—there was any quantity of ducks. You could stand on them lakes there and shoot ducks as they fly over.

Q. Explain why you call it the runway of the deer? A. Because that is the way we would drive them; someone stand on the runway and some more drive them across, and that was the way we would get them, unless they would swim across.

Q. Run between the lakes on this little body of land? A. Run on this ridge—well, this ridge that you told about might be 40 rods across; I could not tell exactly; somewhere near that.

Q. Do you remember of any point where you knew deer to be shot on this runway? A. All through there.

Q. Where? A. All along there, and all along through the woods, but that runway in particular.

Q. How was it in that respect at the north end, between the lakes, north end of this land? A. North end of Hyde Lake?

Q. Between Hyde and Wolf Lakes? A. Well, there used to be deer also there.

Q. And also at the south end? A. South—deer was every place.

Q. Did you ever see the Indians hunt on this tract? A. Yes, sir; I have hunted with them.

Q. Chased game? A. I have hunted and helped chase game with the Indians on that very spot.

Q. Did the Indians have Indian ponies? A. They had, sir.

Q. Did you ever see them chase deer with their ponies? A. They don't chase much with Indian ponies.

Q. How is that? A. They hardly ever chase with Indian ponies. They may sometimes.

Q. How did they do it? A. They came around and drove them.

Q. Go on foot, would they? A. Go on foot; yes, sir.

Q. Was there any difficulty at any time in those early days to go on foot across this body of land from one end to the other? A. Not of my knowledge. There was no trouble while I was there. Of course sometimes maybe a little wetter than other times.

Q. What other game do you say you knew of being on this divide? A. There was—duck would fly over. Of course ducks was a water fowl, but they would fly over there, and we would shoot them as they would go over; and then there was partridge and prairie chickens.

Q. Was there any wolf? A. There was plenty of them. If you wish to know how Wolf Lake got its name I could tell you.

Q. Was that the reason it was called Wolf Lake? A. Well, there is a history to that. It might take too long. If you want me to tell it, I can tell it. Some would like to know how it got its name, probably.

Q. Well, you may, if you know, state how Wolf Lake came to be named. A. Well, there was a hunter named Steve Shay, and him and me was out one day and we had killed three wolves, me and him, that day over on the Indiana side of Wolf Lake, and then I seen him after I came back from Chicago, and says he, "Tom, I had better luck after I went out alone, I killed four." Says he, "I think I will call that Wolf Lake," says he. "I guess it would be a good name," he says, "and I will." That was the first time that I ever heard it called Wolf Lake.

Q. Where did Shay live then? A. He lived back in what is called Sheffield now.

Q. Did he ever live on this body of land between the lakes? A. He did afterwards.

Q. That same Shay? A. That same Shay. It is called Shay Ridge now.

THE COURT: Call what Shay's Ridge? A. This man that killed the wolves. This was called after he had moved to Sheffield it was called Shay's Ridge.

Q. What was called Shay's Ridge? A. Between the two lakes. Between Hyde Lake.

Q. The land between the two lakes? A. Yes, sir; between Hyde Lake and Wolf Lake.

MR. BENNETT: Q. How early was that—how long ago? A. The time it was called Shay's Ridge was—well, the time of the wolves, that we named Wolf Lake, was in 1847.

Q. 1847? A. And he was living at the mouth of Wolf Lake at that time, what is now called Roberts—Sheffield I think it is called now. He had a claim there, and then he moved, and he had sold the claim or lost it, I don't know what—that was it, I guess; he had moved in there between the two lakes where Smale lives now.

Q. Shay used to live about where Smale does now? A. A little north of it; may be about 40 rods north. Steven Shay was his name. He is dead.

Q. In those early days and up to 1857 as you went north and south or south and north across that body of land, was there any water connection between Wolf and Hyde Lake, before 1857? A. Before 1857, do you want to know how the water was in them days?

Q. No, I want to know if there was any channel—artificial—cut by anybody or natural, running from one lake to the other before the year 1857, those early days? A. Well, Charlie Reese, I think he said he cut through the south channel along at that time.

Q. Well, do you know at what time? A. I could not say the time.

Q. I will ask you before there was any ditch cut through, or that you were told there was any, was there any channel or ditch?

THE COURT: Any channel? A. Well, in the year of 1844 until 1850, was the lowest water I ever seen in my life, during them years, and there never was a channel made excepting when Charlie Reese and the old man Roberts—I forget his name, put the north channel. It was just enough for a boat.

MR. BENNETT: Q. Did old man Roberts at one time cut a ditch through? A. That is where I am lost. I forget whether his name was Woods or Roberts, but we called him Woods. He made one. I ain't sure whether it was Woods or Roberts. We called him Woods. He made one there in the year 1857, I think, the north channel, south of where Smale lives now.

Q. About eighty rods from Smale? A. I don't know whether it was eighty, but south.

Q. Was that artificial cut through the ridge where there were poplars? A. It was cut through by this man Woods or Roberts.

THE COURT: About 1857? A. Well, I think around there; I ain't sure.

MR. BENNETT: Q. Was that allowed to fill up or close up? Has there been any ditch there within many years back? A. No; it has not been through there in twelve years; I ain't sure it is 1857. That I am only guessing; it may be later.

Q. Aside from the ditch south—was that south of what is now the Field place that you refer to, the locality of Charlie Reese? A. Charlie Reese's ditch?

Q. Yes, sir. A. Yes, sir; south.

Q. South of the Field place? A. South of the Field place. I was asking Charlie before he died how that ditch came there. Says he, "I cut it there myself."

Q. Aside from that did you ever see the water pass over the lands, the intervening lands between Wolf and Hyde Lake? Did you ever see the waters come together? A. I never could shove a boat across there in my life.

Q. Was there ever any permanent channel, artificial or otherwise, except the one south of the Field place, to your knowledge? A. South of the Field place?

Q. Except that one, was there ever any other? A. That is all the one that I know. No, never no more that I know. I guess there was not. If there was I would be apt to know it, I think.

Q. Did the water pass over that dividing land anywhere at any time that you know, except after the channel you have spoken of was cut? A. Well, in a boat, in these hunting skiffs, you might say most of the time when I would not be in Chicago selling game I was hunting, and I never could get a boat over without jumping out and pulling it over. The last years I have not been down there so much; did not hunt so much.

Q. Did you ever have occasion to take your boat from Hyde Lake to Wolf Lake, or from Wolf Lake to Hyde Lake when you were fishing or hunting down there? A. I did sometimes four or five times a day, across there back and forth.

Q. For how many years were you in the habit of doing that? A. I cant tell how many years. I did it the biggest part of the time you might say. It was my hunting ground up there.

Q. Was never able to get your boat from one lake to the other without pulling it over the land? A. No; never did in my life.

Cross-Examination by MR. GREGORY.

* * * * *

Q. You say you had to drag your boat across from one lake to the other? A. I do.

Q. How far would you have to drag it? A. Well, that would depend a good deal upon the water. Sometimes we would have higher water than other times, and I would not have to drag it so far.

Q. How far would you have to drag it? A. Oh, there was one spot there where in high water I don't think I would have to draw it over six or seven rods; maybe not so much as that.

Q. Maybe not so much as that? A. Yes, sir. I am very careful how I talk.

Q. Where was that place? A. Never mind the map. My eyesight ain't good enough.

Q. I am asking you about the lake. You do not seem to have

confidence in Bennett's map. This is Bennett's map. A. I say I have got the map in my head pretty well.

Q. I know, but I want you to tell me where it was that it was so narrow in high water. You say perhaps a little less than six or seven rods? A. Did you know Charlie Reese?

Q. No, I did not. A. You did not know him?

Q. No, but I knew where the Reese place was. A. Well, you know where that channel of Charley Reese was, don't you?

Q. I heard you just say. A. Well, do you know it?

Q. Yes, I heard what you said. A. It was right at that channel. I would go up the channel as far as I could, when the channel came to be blocked up, and then I had to pull out. Of course the channel never—sometimes run through and sometimes would not.

Q. How long did you say that channel had been there? A. There is two channels. Do you mean the south or north channel?

Q. Which one do you mean? A. I mean Reese's channel.

Q. That is the one I am talking about, the one you just referred to. A. Well, I said 1867, but I might know before or after that; I can't remember.

Q. 1867? A. No, 1857.

Q. What do you say now? A. I say probably before or after 1857.

Q. It was either before or after 1857? A. Yes, sir; that channel.

Q. It was a channel cut by a man named Reese, as I understand? A. Charley told me that before he died.

Q. How far south of that was Mr. Field's house? A. From Charley Reese's?

Q. No; how far south was this channel where Field used to live? A. Oh, it might be, I should think, from Field's, about forty rod; maybe further.

Q. About 40 rods south of Field's, perhaps further? A. Yes, sir.

Q. Where was the other channel that you refer to? A. I am only guessing at the rods, you understand.

Q. Oh, that is all right. Where was the other channel that you refer to? A. Well, the other channel was, may be a quarter of a mile further north.

Q. A quarter of a mile further north? A. Further north. Maybe further.

Q. Maybe further. A. Yes, sir. I think about a quarter.

Q. Was that other channel also an artificial channel? A. It was made by Woods or Roberts. I forget the name, but call him Woods.

Q. How wide was this channel made by Reese? A. By Reese?

Q. Yes, sir. A. Oh, it was, I suppose, big enough to shove a skiff through. May be in high water 6 or 7 rods—no, it was not

7; may be 3 or 4 in high water. In high water—no, it could not be 4 rods.

Q. Might it be 3 rods wide? A. Yes, sir; some times I could shove the skiff through pretty easy, but after all they vary in width. Do you want to know the average?

Q. Well, just give us that. How wide was it in high water, and how wide in low water? A. I could not readily tell how many; it might be perhaps 3; I don't know; 4 rods, I don't think it was.

Q. It might have been 3 rods wide, but you hardly think it was 4? A. I don't think it was 4. I don't know either 3. Sometimes just enough to get a skiff through.

Q. Sometimes just wide enough to get a skiff through? A. Yes, sir.

Q. Now, when the water was high was there any part of the ridge that was kind of damp and wet—swampy? A. High water, you mean?

Q. When the water was high, then? A. Well, of course in high water, the east side of the ridge would be more swampier or damper than it would be other times, in high water.

Q. In high water? A. Yes, sir.

Q. When the water was high, was it possible to walk the entire length of the ridge from the north end down to Reese's place without getting in swampy ground? A. You are talking about very high wa'er, ain't you?

Q. I am talking about high water, very high water. A. Well, of course in very high water you would have to pick your way. There was a little ways at Field's it was rather low.

Q. A little north of Field's was rather low? A. No, between Smale's and Field's, and then from Field's to Reese's it was lower, that is, in high water.

Q. Field's place is on higher ground than the ground immediately north of it and the ground immediately south of it, isn't it? A. Yes, sir; a little higher.

Q. Now, then, in very high water—when was the high water, do you remember? 1858? A. Well, the highest water I ever seen was in the year of 1883—not the highest I ever saw, but for several years, say for 1882 and 1883.

Q. It was pretty high in 1886, wasn't it? A. Not so high then.

Q. Do you remember 1858 and 1857? A. I remember all about them days.

Q. Do you remember about the water being high those years? A. From 1844 to 1850 was the lowest I ever seen.

Q. I am talking about 1857 and 1858? A. Well, no, there was no such water in the year 1842-3, not that I could make out.

Q. You say there was no such high water? A. No, not that I recollect. 1882-3 was the highest water since.

Q. In 1882–3 I understand you to say that the strip north of Field's was pretty wet? A. You could get along all right.

Q. Wouldn't you have to walk in a kind of marshy place? A. Well, hunting snipes and ducks you always have India rubber boots.

Q. You needed India rubber boots then? A. You always have them when you hunt.

Q. Wasn't there a low place up near Smale's house—about forty rods south of Smale's house—wasn't there a low place for a short distance, kind of a break in the ridge? A. Yes, sir; pretty low there.

Q. It was kind of wet when the water was high, wasn't it? A. Have to have on boots going through there.

Q. How high up would the water come on a man at that place? A. Oh, there may be little places you need boots, but I couldn't get a boat across.

Q. Clear across? A. Not without pulling it.

Q. Hasn't the water ever been so high in that place south of Smale's there that you could get a boat across? A. Not that I could.

Q. Have you ever tried to get a skiff through there? A. I hunted in a skiff that weighed may be seventy-five pounds.

Q. How is that? A. I hunted in a skiff that weighed about seventy-five pounds.

Q. Have you ever tried to get that through when the water was in there? A. Yes, sir; I have tried very often; always had to pull it over.

Q. Always had to pull it over? A. Yes, sir; before those channels were made.

Q. Before those channels you speak of were made? A. Of course after the channels were made we would go through them as far as we could.

Q. Does this ridge north of Field's house lie where the road is? Is the road on the ridge? A. Well, as for a road, you have to make a road the best way you can. There was no road there unless you picked out the best spot to get through.

Q. Could horses get along there? A. Well, a horse could get along there most any time I ever seen it.

Q. At all times? A. Most all times. I never tried horses. I used to have a good many Indian ponies in my time and used to drive them over there.

Q. Were there not times when you could not get a horse across that piece north of Field's, in very high water? A. Of course, I didn't drive a horse across, but I never seen the time I could not drive an Indian pony across there.

Q. Didn't they get down into the mire a good deal there? A. Not but what they can get out all right.

Q. They sometimes got mired there, didn't they? A. No,

they never got mired on that ridge. Never got mired at any place—ponies. Cows got mired at places, but not ponies.

Q. Ponies don't get mired? A. Well, they do sometimes. Ponies would get out where our American horses would not.

Q. Could an American horse have got across that place? A. Not unless it ought to be led over.

Q. It would have to be led over? A. To pick the right spots.

Q. Have to pick the way very carefully? A. I am talking of high water.

Q. Was it possible, Mr. Gaughan, in times of high water to cross that low place north of Field's without walking in water of a moderate depth? A. Well, you understand what I say; hunters generally have India rubber boots, and of course, in places, if you have not got boots, you will get a wet foot, probably.

Q. What I mean is, wasn't there a shallow depth of water over that low place north of Field's, in times of very high water? A. No, I never seen that it was at all. It may be there but I never seen it.

Q. You never have seen any water on that place? A. I have seen water on that.

THE COURT: How deep? A. Well, to pick your way across, I don't think it would take over four inches or so; four inches, more or less; might not take that.

MR. GREGORY: Q. You could pick your way across, could you; across that strip without walking in water more than about four inches deep? A. Well, I don't know; might not go four inches; might not go. I am only guessing at it. We would always have India rubber boots.

Q. Part of the ridge was always above water, wasn't it? A. Part of it?

Q. Yes, sir. A. You might say the biggest part, except this low place. So, I see in Chicago here, for that matter; might shoot ducks in some part of it.

Re-direct Examination by Mr. BENNETT.

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Q. When you first knew this locality, in 1840, and that region, what do you say as to the water being high or low? A. I said from the year 1844 to 1850 was the lowest water I ever seen.

Q. Do you remember before that how it was? A. I remember before that I seen Indian Lake in 1836, but I was rather young.

Q. I mean as to the water being high or low? A. Well, before that I could not say much about it, because I was rather young.

MR. DENT read the cross-examination of this witness, taken in April, 1889.

Cross-Examination by Mr. HARDIN.

Q. Where were you born? A. In Ireland.

Q. When were you born? A. Don't exactly know; never had it written down.

Q. How do you know it was in 1835 that you first went to what is known as South Chicago? A. How did I know? By my father coming from Rochester in that year; my father came from Rochester in that year, in August, and he dies the same year; am I answering you right? My father came from Rochester that year, 1835, and we landed in Chicago the third day of August.

Q. How do you know that to be a fact? A. How do I know it? Don't I know when my father died? I was old enough to know; he died the same month we came here.

Q. How old do you think you were at that time? A. I can't tell; don't know exactly, but was quite a boy; old enough to remember.

Q. How old do you think you were? A. Can't give any estimation; was quite a boy.

Q. And you don't know how old you are now? A. Not that I could swear; in them days I did not keep any record of date.

Q. How do you fix the fact that you are about 60 years of age? A. I say about 60.

Q. How do you fix it at 60? A. I guess at it; I said about 60.

Q. You don't know but that you are younger than 60? A. No, I can't say; I know I was quite a boy in 1835 and remember everything.

Q. You say you have been in a boat all over the lakes down there, what we now call Hyde Lake and Wolf Lake? A. Been in a boat; I think I was; yes, sir.

Q. How did you go on these lakes in a boat? A. How did I go; how did I get there?

Q. Yes. A. Well, there is Chittenden Creek growing out of the Calumet River; we generally got through that creek.

Q. Then you would go from South Chicago in a boat? How did you do that? A. We went by the way of the river through Chittenden Creek, sometimes by way of the lake; we would pull the boat over; that was one way; then if we did not want to go by the way of the Calumet river we would go by Lake Michigan and sometime Wolf River; go in through that river and pull the boat over.

Q. Wolf River sometimes was open so that you could go in from Lake Michigan by boat? A. Yes, sir; it was.

Q. How large was the opening? A. When it was breaking up by freshet, may be, I have seen the river as large as five or six feet deep.

Q. And about how wide? A. I think I have seen it five or six rods wide, may be more.

Q. Was that opening in depth sufficient for larger craft than your own small boats to enter? A. The highest water that came would take quite a scull, but generally only the smallest boats could go through; sometimes a raft of timber would go through.

Q. Where did the raft of timber go to? A. Generally stopped at South Chicago.

Q. They could cut the timber around Wolf Lake? A. No, sir.

Q. Where did they get the timber? A. Up around Benjamin Lake, in what we called the Pine Woods.

Q. Tell me what you call Benjamin Lake? A. There is Wolf Lake first, then you go up into the Lake of the Woods, now called Lake George; and you go up from Hyde Lake into Wolf Lake, and from Lake George you go into Lake Benjamin.

Q. Then you got the timber there? A. You go into Benjamin Lake into the Pine Wood Slough; then you go through the Pine Wood Slough into a place called Log Bridges, into a canal.

Q. Then this timber was rafted down across these lakes? A. That was one way, and another way was by Lake Michigan.

Q. Rafted them all the way from Wolf River to Chicago by Lake Michigan? A. Down Wolf Lake into Lake Michigan; and sometimes landed at South Chicago and then hauled it up to Chicago proper. This is the first way I told you of, I believe.

Q. Tell us the other? A. Go by team or any way and by Lake Michigan.

Q. How do you go by Hyde Lake? A. I told you about that; that is another way what we call the inward and the outward way we had.

Q. Give us what you call the outward way? A. You go with a team about twelve miles to what is called Pine Station; get the timber ready to start and haul that by teams to Lake Michigan, then raft it on Lake Michigan; and then with a span of horses, or sometimes cattle, take it to South Chicago or Chicago.

Q. You said a moment ago that they were rafted in two directions, one through Wolf River and Lake Michigan? A. I was giving you the inward and outward ways.

Q. Then the other way was through Calument River and Hyde Lake, is that correct? A. Well, you might go through into Wolf Lake if the river was good and deep.

Q. How would they get into the Calumet River, through Chittenden Creek? A. I did not say they would go into that; I told you they would go down Wolf River and Wolf Lake.

Q. Did you ever see these rafts in Hyde Lake? A. Never, sir, not that I know of; may be if a man wanted to build a log house he would pull them over, but never a regular raft.

Q. Did you ever see any sail vessels in these lakes in these days? A. Nothing more than a small boat or canoe.

Q. Any vessels go on either of the lakes? A. No, sir, not in those days.

Q. Do you mean to say that you never saw Wolf River open into Lake Michigan so that a sailing craft on Lake Michigan could not go into it? A. No, sir.

Q. What did you say? A. I said I had seen it with five or

six feet of water when it would break out into Lake Michigan—Wolf Lake I mean.

Q. If there had been vessels on Wolf Lake going from Lake Michigan, would you have seen them? A. I might have seen them; was not there every day.

Q. Some days you were not there? A. I was not there every day; two or three times a week I was.

Q. In your small boat when you got in from Calumet River into Hyde Lake, how did you go from there into what we call Wolf Lake? A. Go up the Calumet River from South Chicago and go into what is called Chittenden Creek and from that into Hyde Lake.

Q. How do you get into Wolf Lake? A. Then when I got into Wolf Lake; well there was a channel and we pulled the skiffs across, small boats and canoes, I mean.

Q. How often during the year were you down there as a rule? A. In the winter as often as I could get down; during the summer almost every day.

Q. How often in the summer time? A. In duck time we were there whenever we could be there, maybe two or three times a week; three times a week I will say.

Q. How was it with regard to the water; sometimes high and sometimes low? A. As I said before, in the times of heavy rains we had higher water than when it was dry.

Q. How was it in times of high water with regard to your getting from the western part of the lake to the eastern? A. There is a little channel, and in very high water we would not have to pull the boat over ten rods; in very low water we would have to pull the boats perhaps 100 rods, across Charley Reese's ridge, we called it; never so low but we could pull the boat through; never rowed the boat through even in the highest water, to my knowledge; the highest water I ever seen there was in 1882; even then I could not get the boat through without pulling it over, as long as I lived there could not get boat through without pulling it.

Q. Was there a connection between the two lakes in 1882? A. Yes, there was the Charley Reese's pass.

Q. I understood you that you pulled the boat over in 1882? A. Pulled it over this ridge, we would go by that pass as far as we could, but had to pull the boat some.

Q. How did you get through the pass? A. Even in 1882 could not get the boat through without pulling it. I will tell you how that was. We shoved the skiff up as far as we could go into this channel; when we went as far as we could, then we would pull the boat the rest of the way there, maybe even in 1882 five rods, maybe six; can't tell exactly.

Q. Where with reference to the Reese place and the Field place was this connection, this ditch? A. This ditch was, why Field's fence come right up to the ditch close to it, not exactly on it.

Q. You say this connection existed there in a state of nature? A.

No, sir; I did not say that; you don't understand what I say. I say when I went there there was no channel.

Q. You have said, if I understand you, that there were two passes? A. I did, sir.

Q. The north pass and the south pass? A. Yes, sir.

Q. If you don't mean the south pass tell us what you do mean? A. You asked when I went there, and there was, I say, no channel in those days there.

Q. Where was the south pass? A. Between Reese's and Field's; that was a natural cut, made by nature.

Q. When did you first see that? A. Let me see; I said we went through the north pass; I am trying to get at it.

Q. When did you first see the south pass? A. Well, I am trying to get at it. The first time I ever saw the south pass, I think, was in 1859.

Q. Who had dug it there? A. I did not say that it had been dug there.

Q How had it been constructed? A. By nature, by the wearing or washing of the waters on the land.

Q. How wide was that in a state of nature? A. Wide enough to get through in high water in a small boat, about as far as that ridge; never across that ridge.

Q. How wide was the ridge that you speak of that you would pull the boats across after you entered this natural channel? A. How wide the ridge was? I say you would have to shove the boat up the channel as far as you could, and in time of high water you would have to pull the boat over that ridge, perhaps, four or five rods, and in times of low water as far as 100 rods over the ridge.

Q. You mean the entire ridge, or only that part of it where you pulled the boat over after you entered the channel? A. I mean that part—

Q. You mean from where you stopped when you could go no further? A. Yes; and I say from four to five or six rods in high water.

Q. Tell us about this northern construction, where was that? A. That was cut through by a man by the name of Robinson. You know where Smith keeps on the bank of Hyde Lake? I say it was about opposite Smith's.

Q. What do you mean by opposite? A. I mean on the east side, and to get at it correctly, it may be maybe sixty rods south of Smale's house.

Q. South of Smale's house? A. The house; yes, sir. I am guessing at the distance.

Q. You say that was an artificial channel, dug by a man by the name of Robinson. How do you know who dug it; did you see him dig it? A. I know it out of his own mouth.

Q. Is that the only way you know of the existence of that channel? A. I did not see Robinson dig it, but I heard many people

say that they knew he dug it and I think Abe Klineman saw him dig it.

Q. This is the only way you have of knowing who dug it? A. Yes, sir; I did not see him dig it.

Q. How far north of the Field house was this ditch? A. About half way between Field's and Smale's; I only guess at the distance; there was a poplar ridge there.

Q. What do you mean by the poplar ridge? A. There was a ridge of poplars—more poplars growing on that spot than on any part of the ridge.

Q. Have you ever been through that ditch? A. Through the Robinson pass?

Q. This pass we are speaking about? A. Yes, sir. I was through there before the Charley Reese pass was made.

Q. Could get through there at low water? A. When he first dug it it was like a canal and you could get to Wolf Lake.

Q. How wide was that channel? A. When he first dug it, it was about five feet, guessing at it.

Q. How long was it across? A. That pass is the longest way, that is the widest part of the whole ridge, nearly 100 rods; that is, the widest part.

Q. What was the character of the bottom or land on each side of this ridge? A. Well, on the Hyde Lake part there is pretty hard bottom; some pond lillies, but even there, quite hard bottom.

Q. Sand, you mean? A. Little mucky on top and hard bottom when you get down on the Hyde Lake side.

Q. In digging this ditch through from what you call Hyde Lake to Wolf Lake through this material, just describe the nature of that material all the way through? A. Do you mean of this cut through there?

Q. Yes, what you know of the bottom, so as to give us some idea of its character, what sort of material was cut through? A. I say all the way from Hyde Lake to Poplar Ridge was muck on top and then quicksand, and from Poplar Ridge was quicksand; after you got through this ridge was muck again.

Q. How deep was the muck? A. About three feet of muck—black dirt.

Q. Was grass growing through this muck? A. Before the channel was cut through, of course.

Q. Do you know if he excavated the sand in cutting through? A. He did; and cut down so deep it built up a big pile of quicksand, and I suppose it is there yet.

Q. Where was this ridge of poplar located? A. On the same ridge that Field's and Smale's were on.

Q. And that ridge, if I understand, runs south across this ditch which you say was dug by Robinson? A. Yes; I call it the Charley Reese ridge. I might call it the Smale ridge now.

Q. Why do you call that a ridge? A. Because it is wide and mucky and there is no other ridge there.

Q. You called that a ridge because on each side of it where it crosses this Robinson ditch it was mucky on each side of it? A. Yes, on each side it was mucky.

Q. Was this space through which this ditch was dug of the same character, muck and sand; that is, sand bottom with muck on top? A. You mean where the poplar ridge was?

Q. Yes, what you called the poplar ridge; I mean where the Robinson ditch crossed? A. I said on the Hyde Lake side there was some muck and hard bottom underneath.

Q. Did that extend all the way across? A. No; then you come to poplar ridge, and the channel was cut through.

Q. That is what I wanted to get at; you say the poplar ridge runs south, if I understand you, across this Robinson ditch? A. The whole ridge run south, and run south before it was cut through; the ridge was north and south before it was cut.

Q. If I understand you, a continuous ridge extended from the Smale place all the way across this ditch and was called poplar ridge? A. Before this Robinson ditch was cut through there it was from Lake Michigan to Hegewisch.

Q Did it run all the way from Smale's house south across the Robinson ditch? A. Before the Robinson ditch was dug through the poplar ridge run clear through to Charley Reese's.

Q. How large were those trees? A. Which trees?

Q. The poplars; you say there was a ridge of poplars called poplar ridge; how large were they in diameter? A. At a rough guess I should say all the way from one-half inch to ten inches.

Q. Were there other trees there ten inches in diameter? A. Am not sure.

Q. Are you sure there were trees there at all? A. Yes, sir; these poplar trees.

Q. Have you ever seen any poplar trees of any size right there where you say the Robinson ditch crossed this ridge? A. Have I ever seen poplar trees there? Yes, sir.

Q. Sure? A. I am not mistaken.

Q. Not mistaken? A. I am not saying they are there now.

Q. If they had been cut down the stumps would be there? A. Yes, sir.

Q. When did you go there last? A. Have not been there for several years.

Q. Did you not say a moment ago that there were poplar trees there now? A. No, I think there are; that is all I know about it now.

Q. You do not know of your own knowledge? A. I cannot swear to there being trees there now; they may be cut down.

Q. How wide was this portion of the ridge upon which you say the poplar trees grew? Just where the ditch crosses that ridge? A. I believe I have told you that four or five times.

Q. Now, Mr. Gaughan, if I have understood you, you have said that this ditch run through a deposit of muck, until it got to

the ridge of poplars. I ask you how wide the ridge, upon which you say the poplar trees grew, was? A. I think that ridge was, maybe, about five or six rods wide where the poplars were.

Q. Are you sure of that? A. No; I don't say I am sure.

Q. What do you know about it? A. I am telling you what I know.

Q. You know there was a ridge there? A. Yes, sir.

Q. You know there were poplar trees there? A. Yes, sir.

Q. But you cannot say how wide that ridge was? A. I could only guess at it, unless I took a tape measure and measured it.

Q. Give an idea? A. I have given you an idea. I said may be five or six rods wide.

Q. Was there an elevation of land upon which the trees grew, at the point where this ditch run through the ridge? A. Yes; there was an elevation each side of the ridge.

Q, How much higher was that elevation at the ditch than it was at each side where you say the ditch was cut through? A. You mean the middle of the ridge?

Q. I mean any part of it; how much higher was the muck; you say the ridge was five or six rods wide, how high was it? A. I think higher than the lake—Hyde Lake or Wolf Lake—well, I think Robinson threw out three or four feet of sand.

Q. I don't think you understand me, Mr. Gaughan. But tell me, was there any other kind of growth besides the poplars? A. There was.

Q. What were they? A. You mean on the ridge?

Q. Where the ditch crossed? A. On the very ridge you might say a variety; there was wild cherry, willows, some yellow ash, but more poplars, as we called it the poplar ridge.

Q. Were there any other large trees there? You say the poplar trees were ten inches in diameter—any other kind of trees there? A. In that very spot? There was some ash and some red oak and yellow oak and some basswood.

Q. How large were they? A. Quite small; there was some basswood, may be not over ten inches.

Q You don't remember how large the other trees were? A. I say the others were not very large.

Q. Were they as large as the poplars? A. I think so; may be larger.

Q. And they extended throughout the ridge that the poplar trees were on, interspersed among them? A. There was a mixture.

Q. And you say that ridge was about five or six rods wide? A. The very ridge, I say, where they cut through from one lake to the other, was 100 rods.

Q. What was the character of that portion lying east and west of what you call poplar ridge, and which you have said was a sandy bottom with a muck deposit? In time of high water was that very wide and overflowed the land? A. In times of very high water it

got very close to this channel. If there was no channel and it did not overflow we pulled the boat across.

Q. How near to this ridge in times of high water did the water come? A. To poplar ridge I have seen it so that on the Hyde Lake part you could touch the bank with a small boat.

Q. How was it on the Wolf Lake side? A. There in the spring of the year you could come up farther than in the fall.

Q. What kept a boat from coming up? A. There was this heavy tall grass and such things.

Q. If there had been no grass there could you have pushed the boat through? A. I suppose if there had been enough water you could have pushed the boat through, but in the time of the highest water you could not push the boat through.

Q. How high was this ridge in times of high water? A. This elevated part?

Q. Yes. A. In high water I should say it run up to two feet higher on the high part.

Q. So that the waters of both lakes would come pretty near together? A. On Hyde Lake but not Wolf Lake.

Q. How wide was the ridge in feet in times of high water? A. There are a good many opinions about that.

Q. Give me your opinion? A. It come up within 20 rods of that ditch on the Wolf side.

Q. You say the elevation upon which the trees were growing was five or six rods wide? A. About.

Q. And you said about three or four feet high; I want to know how much higher the water was on this ridge in times of high water? A. On the Hyde Lake side very near to the ridge; on the Wolf Lake side, you could not get within 20 rods of it.

Q. How many feet wide in high water between the waters? A. I don't think I put it under 100 yards; there was grass and such things that would not let you get in there.

Q. Grass was growing in the water? A. Nearly all the time, yes, sir.

Q. These periods of high water would last quite a long time; would they not? A. Depends upon the time; if it was a rainy time it would last till a dry time; I suppose you know when it is time for high water?

Q. I don't know? A. Well, I don't think to detain the court so long; as far as I understand high water,—well some folks say it is only every seven years; what is known as high water is known as the heavy wet season in one sense; in another sense it is when a heavy northeaster sweeps up that place for miles and sends the waters up and than it goes down again.

Q. They had spring rains in that part of the country? A. And some years more than others; in 1882 we had the highest water.

Q. You don't say why the water was so high in 1882; you say you never recollect seeing water higher than in 1882? A. No, I don't recollect seeing higher water there than in 1882.

Q. Is it not a fact that regularly every spring they will have high water down there during the rainy season? A. Of course in the spring of the year it is fed more by Lake Michigan than by the rain.

Q. And this space which you say lies between Hyde and Wolf lakes in times of high water would be widely covered with water, and there was grass so that a boat could not go through? A. I said grass grew there, but not that the water covered all the ridge.

Q. If you started from Smale's house and wanted to go to Charley Reese's how would you get there? A. If I started from Smale's house I would keep on dry land on the ridge; I could go on that in high water until I come to Field's, then there would be a low strip of land, and if there was a bridge—

Q. And you say you could have walked from the Smale house to the Reese house on the continuous elevation or ridge? A. Before this pass was cut through I say I would pick my way.

Q. In order to get there you would confine yourself to the elevations? A. I would have to pick my way the best I could; I would not walk in muck when I could have the ridge.

Q. You could not have walked on each side, could you? A. If you had rubber boots it would be all right.

Q. How deep would you go down? A. In high water you would not go down very deep; I would not go when I would go down.

Q. Have hip rubber boots? A. Do you mean on the ridge or the low places? If you got off the ridge you have to have rubbers; you could get along without hip boots.

Q. You said there was a continuation of this ridge north of the Smale house to Lake Michigan? A. Yes, sir.

Q. Upon which you say you drove deer? A. Yes, sir.

Q. Do I understand you that the deer would go down that ridge and across to Reese's house? A. This was before I ever saw Charley Reese; that was our hunting ground.

Q. It was across the ridge that the deer ran? A. Lengthways, not across it.

Q. Past Charley Reese's? A. From Hegewisch through Hickory Point, might say to Lake Michigan.

Q. Why was that called Hickory Point? A. Because there were very few if any hickory trees except upon that point.

Q. Why was it called a point? A. Because that little spot that I was telling you about, that spot made by nature—

Q. How far north does the low place extend and how wide is it from Hickory Point north? A. There is a low spot that I was saying, as I told you, going to Field's from Charley Reese's; it commences quite low south of Field's, and then there was a kind of cut-off and we called it a point.

Q. Then from Hickory Point north there was a low place? A. Not so much lower, but we called it a point.

Q. Is it not a fact it was called a point because it was the termi-

nation of the ridge and that when you got to the point you went— A. No, sir; that is not why we called it a point, and we called it Hickory Point because there were hickory trees and only little scrubs of other kinds of trees.

Q. I want you to confine yourself to that point—Hickory Point—where you say it was low, and tell me what sort of material there was there; was it of the same character as that portion lying north of the Field house, sandy bottom and muck deposit? A. After you cross that channel—

Q. South of the channel? A. You go south, and it is high till you cross the natural channel, and then it is low till you get to Field's again.

Q. You don't understand my question, Mr. Gaughan. What sort of bottom was there in that low place? A. The lowest place?

Q. I mean the general bottom between Hickory Point and Field's house? A. With the exception of where you crossed the channel you could walk pretty dry any time; after you crossed the channel south of Field's there—it was mucky and low south of Field's.

Q. How wide was the ridge from Hickory Point to the channel which you say was cut through? A. I did not say it was cut through there.

Q. I understand you to say so? A. No, sir; I said it was naturally made.

Q. The natural channel then; how wide was this ridge that you say you could go upon in periods of dry weather, to this channel? A. What part of the ridge do you mean? I told you how wide it was.

Q. From Hickory Point you would have to cross this channel? A. You mean between Smale's and Field's?

Q. I mean from Hickory Point north to the Field's house? A. You would have to cross the channel if it was open.

Q. How would you go there? A. If there is a channel there, you would go by boat, I suppose. I am talking about my early days there; I have not been there lately.

Q. In those early days, to go from Field's house to Hickory Point, you would go by boat? A. I told you there was no channel there then.

Q. I am not talking about any channel; but starting from Hickory Point and desiring to go to Field's house, how would you go there? A. Before there was—

Q. Never mind about the channel. A. Walk there. In them days I—

Q. Could you walk there now? A. I don't know; I have not been there examining that spot lately. The last year or two, since there was a railroad bridge there, and you could cross that way.

Q. Was there a road running from Hickory Point to Field's house? A. Yes, sir.

Q. How wide was that road? A. Maybe five or six rods. It was high, like Poplar Ridge.

Q. You have not told us how high that ridge was. A. I should think about five or six feet high.

Q. How much higher was it than that portion to the east and west of it? A. I should think maybe four feet. I should think so.

Q. Well, would you say it was lower than the poplar ridge? A. I think so.

Q. And you say poplar ridge is four or five feet high? A. You asked me for low water, didn't you?

Q. Was the character of this muck deposit south of the Field house and between there and Hickory Point, about the same as it was north of Field's in the neighborhood where you say Robinson's cut was located? A. You mean the poplar ridge?

Q. Yes. A. Of course here was a great difference; there was some like sod muck, but the Robinson cut was a sand ridge. This was a regular grass muck in low water, I mean; in the year '44 it was the lowest I ever saw it, I believe.

Q. I understand you to say that there was a straight road that led down to this ridge? A. What ridge?

Q. The ridge we are talking about, to Smale's house and Hickory Point? A. I can't see how you could understand that. I did not say that.

Q. Did you not say so? A. Don't you know that I did not?

Q. You have spoken of the effect of Lake Michigan upon this lake. If I understand you, you said that when the winds were from the north they would sweep down Lake Michigan, and that that would raise the water in this lake; am I correct? A. As I said, that makes high water when a heavy northeaster sweeps over Lake Michigan that drives the waters into these lakes and makes the water higher.

Q. How high do these northeast winds affect Lake Michigan? A. Well, when there is a roaring northeaster it will affect the waters as far as Hegewisch.

Q. How high, that is, how much higher would it make the waters rise; that is, how many feet? A. In the river it would raise the waters higher than in the lakes; I have seen it raise perhaps two feet in the Calumet River.

Q. Have you seen it rise more than two feet? A. I might.

Q. How much less than two feet? A. I cannot say that. It may be about two feet.

Q. What would you think if I should tell you that it would raise it as high as five feet? A. I would not dispute that; I am only guessing as to how high it would raise the waters in the rivers and in the lakes.

Q. If Wolf Lake opens into Lake Michigan would not Wolf River be affected? A. I guess not; Calumet is a running stream, and as the water goes into it there it stops and dams it up.

Q. When was it you say the effect of Lake Michigan upon the Calumet River, when did you first notice it? A. Been so long I forget that.

Q. Was it way back in '40? A. As long as I remember, and noticed that the wells were also affected.

Q. And when was it you first knew of Wolf River being open? How long from that time? A. Saw the river open sometimes and sometimes it was dammed up.

Q. What was there to prevent Wolf River from being affected way back there in '40 same as the Calumet? A. Didn't I just tell you?

Q. Tell it again? A. The Calumet has a current and a very stiff current, and when the north wind takes the current it goes back and it raises it several feet more.

Q. This is the only reason? A. That is the only reason that I can tell.

Q. Do you know when the Calumet River was opened by the government and a harbor established there? A. Several times they attempted to open it; once in Jeff Davis' time.

Q. I mean by the government? A. This last pier, you mean? The first crib was driven in the year 1870.

Q. Prior to that time where was the outlet of the Calumet River into Lake Michigan? A. That was like Wolf Lake; sometimes it would break out and then again it would go down and the sand would gather and form a dam, perhaps a half mile.

Q. How extensive—how large in times of high water have you seen the Chittenden Creek connection? A. Chittenden Creek?

Q. Yes, where it connects the Calumet River with Wolf Lake? A. What do you mean, by rains or by Lake Michigan?

Q. In times of high water? A. In times of high water, well, I can't just exactly say.

Q. How wide in times of high water? A. You ask me in times of high water how wide it is? The creek was no wider than it is now; it was mayoe five rods wide.

Q. You have been there with a boat? A. Yes.

Q. Can you give me some idea of the width? A. I say Chittenden Creek may be five or six or even seven rods wide.

Q. Did it continue that width all the way? A. No, sir.

Q. How was it in times of high water? Would it be wider? A. No wider, but it would give you more room for a boat.

Q. In times of high water there would be a good deal of water coming from Wolf Lake? A. In times of high water there was not such a current.

Q. My question, Mr. Gaughan, was, would there not be a large flow of water through Wolf Lake into the Chittenden outlet? A. I say a foot, maybe higher.

Q. Higher? You mean a foot higher than low water? A. Yes.

Q. Would there not be a large amount of water coming in

through when Calumet River was high? A. Of course, there would be higher water; you might call it a large amount. You could row a boat through there when the water was so high sometimes and not shove the boat at all; in low water you must shove it.

Q. Before the Calumet River was permanently opened up into Lake Michigan, a want of proper outlet caused the waters to back up into the country generally, didn't it? A. No.

Q. Do you mean to say that the outlet of the water was as free as it is now? A. No, sir.

Q. And you don't think it is true, then, in consequence of the want of an opening, that the water was slower in getting out and flowed back; don't the water pour out faster now than formerly? A. Oh, yes; it has a better chance now; it has a better channel.

Q. When the mouth of the Wolf River was closed by the sandbars you have mentioned, the effect of the spring freshet and rains and high water from any cause, would there not be more water in Wolf Lake, that is, higher than in Lake Michigan? A. You mean going in through Wolf River?

Q. No, I mean when Wolf River was closed that the rains and high water from any cause would make the elevation of water higher than in Lake Michigan, and the water of Wolf Lake would cut its way through into Lake Michigan? A. Of course, the rains would naturally make it higher.

Q. You are not prepared to say, Mr. Gaughan, from your knowledge and observation of these elevations, or whatever you call this portion which you say separates Wolf Lake from Hyde Lake, you are not prepared to say that water does not at times cover there—flows over it? A. You mean the ridge?

Q. Yes. A. I never saw it so.

Q. You never saw the water covering the ridge, you say? A. I have crossed the ridge a thousand times, I guess, and never saw the time but what I had to pull a boat through, unless there was a channel.

Q. You are not prepared to say that with the obstruction of Wolf river removed and the waters of Wolf Lake opening into Lake Michigan, and with Lake Michigan five feet higher than its ordinary elevation, that that entire ridge would not be overflowed; you are not prepared to say that this could not be so?

Objected to by Mr. Bennett as assuming that the elevation is five feet higher than the ordinary level.

A. I never crossed that ridge but that I pulled my boat over; there was not enough water there.

Q. How deep is the water of Wolf River, Mr. Gaughan, do you know? A. From Shedd's icehouse to Lake Michigan, you mean?

Q. I mean the Wolf River? A. In some places it was eight feet deep, and in some parts maybe ten feet; I am guessing at it; I can't say positively.

Q. How is it generally throughout Wolf Lake with regard to depth of water? A. The deepest part of Wolf Lake I could not touch bottom.

Q. Would you say it is seven or eight feet deep? A. Yes.

Q. How is it in other places? A. I say in coming across the lake in some places I could not touch bottom with my oars

Q. You mean that generally the bottom of Wolf Lake is eight feet from the surface? A. No, I don't mean that; I mean in high water and in some parts of the lake; the average part of Wolf Lake is, I don't think, more than four or five feet of water.

Q. There are places where it is deeper? A. Yes, some places where it is ten feet deep.

Q. How large in extent are these places—how much space do they cover? A. The space may be for about a half a mile from Lake George down.

Q. Do you know whether that depth is of uniform character, or does it run in channels? A. It is that deep only in certain places; I say maybe, for half a mile it is that deep, it is about the center of the lake.

Q. About the center? A. Yes, about the center.

Q. About how deep is the water in Hyde Lake? A. The highest water in that is about five feet deep, or maybe six feet, being in the very center of it, and in low water—I mean in the year '44, you could hardly get a boat through; the water was low in '79, too, but in '44 it was the lowest I ever saw it there.

Q. You say in times of low water you could hardly push a boat through Hyde Lake, there was not water enough, I understand you to say, to float a boat; you had to pull it through? A. You have seen a good heavy dew in your times, haven't you? I could almost shove a boat over a good heavy dew.

Q. Do you mean in times of low water there was scarcely more than a good heavy dew? A. No, I did not say that. I said in a good heavy dew I could shove a boat over.

Q. How much water do you think there was when you said it was difficult to push a boat through? A. You mean in the lake?

Q. I mean in Hyde Lake. A. Excuse me; I am talking about the ridge all this time. I am not talking about the lake.

Q. You are talking about the ridge all this time. A. I was talking about the ridge in going from Hyde Lake to Wolf Lake.

Q. You wish me to understand that in times of low water you had hard work to push your boat over the ridge? A. Yes; Poplar Ridge.

Q. I am asking you if you knew in times of low water the condition of water in what you call Hyde Lake? A. The middle of the lake?

Q. O, well, generally; give us some idea; how deep would the water be then? A. After you go through Chittenden Creek to Hyde Lake, in low water, you could shove a boat around; the water then would be from an inch to about a foot or a foot and a

half deep; maybe two feet there; I mean in the middle of the lake; that was in '79, I guess.

MR. GREGORY: Q. When water was high in this region was the ridge swampy and wet? A. You mean the very center of the ridge?

Q. Yes. A. Well, the very center of the poplar ridge was never swampy or wet to my knowledge; not where he called it Poplar Ridge.

JOHN J. KLEINMAN, called as a witness on behalf of the defendant Conrad N. Jordan, was duly sworn, and testified as follows:

Direct Examination by MR. BENNETT.

Q. What is your name? A. John J. Kleinman.

Q. Where do you reside? A. 647 Fulton street, city.

Q. How long have you lived there? A. About six years where I am now.

Q. What is your age? A. I will be fifty-two the 11th of next January.

Q. Where did you live before you moved to the west side of the city? A. At what is called South Chicago now. We used to call it Calumet. Moved there in 1846.

Q. Where did you live with reference to the Chittenden bridge, if you know where that is? A. That is about four miles from South Chicago.

THE COURT: Q. Four miles? A. Yes, sir; four miles.

MR. BENNETT. Q. Did you ever live south of that, near the Chittenden bridge, before that? A. When we first moved out there, we moved to South Chicago; that is, four miles to Chittenden bridge, then we moved up to the old place, about a mile from the Chittenden bridge.

Q. North of Chittenden bridge? A. Yes, sir.

Q. How early did you move there. A. In 1857.

Q. How long had you lived in South Chicago before that? A. Well, from 1846.

Q. Are you acquainted with what is known now as Hyde Lake and the surrounding lands?. A. Yes, sir.

Q. How long have you known that locality, Mr. Kleinman? A. Those lakes, you mean.

Q. Known that locality, the lake and the land surrounding Hyde Lake? A. Well, I know it since about 1848, I think, but not much of it. I don't remember much then; I was pretty young.

Q. You have known it since 1848? A. Yes, sir; anyhow; may be a little before.

Q. When you lived within a mile of Chittenden bridge, was the land on the east side of Hyde Lake in sight of your house? Could you see the land between Hyde and Wolf lakes from where you resided north of that Chittenden bridge, about a mile? A. Oh, yes; you could see that ridge through a kind of an open place.

Q. What opportunities did you have for becoming acquainted

with Hyde Lake and the land lying east of Hyde Lake from 1848 or thereabouts? A. Well, from about 1857, we used to hunt over there.

Q. Before you moved down to near Chittenden's bridge? A. Yes, sir; after we moved down there.

Q. Did you hunt before that down there? A. Well, we used to sometimes, but not much. I have hunted there before this, and on Wolf Lake.

Q How frequently did you visit this locality from 1857 down? A. Well, from 1857 to about 1861, I used to go there every fall and spring three or four times a week.

Q. Did you go alone or did you have others go with you—your family? A. I used to go alone; used to hunt.

Q. How recently have you been over lands lying east of Hyde Lake, between Wolf and Hyde lakes, upon the lands there? A. Along the east side there?

Q. On the lands lying between Hyde and Wolf lakes? A. Yes, sir.

Q. How recently have you been over those lands? A. Well, I have been there last year a couple of times. I have not been up there this year.

Q. Did you see this locality before you moved down to Chittenden's bridge, in 1857, while you lived in South Chicago? A. Yes, sir; I had seen that; yes, sir.

Q. How many times did you see it? How early? A. I could not tell you; a good many times.

Q. Well, about? A. Well, we used to go over there spearing once in a while.

Q. Fishing? A. Spearing. Spearing muskrats.

Q. How early a date would you fix that? A. 1852 and '53 and '55, maybe, up to 1857. We used to go over there in 1857, once in a while. We used to go over there once in a while.

Q. From 1850 to 1857? A. Yes, sir.

Q. Now, Mr. Kleinman, since you first saw the body of land lying between Hyde and Wolf lakes, has there been any material change there? A. No, sir. The water changes, of course, high and low, the same as it does in the river.

Q. What is the comparison as to the timber which was on this body of land, when you first saw this locality between Hyde and Wolf lakes? A. Yes, sir.

Q. Were the lakes separated at that time? Were there two lakes, or one? A. There was two lakes, Hyde Lake and Wolf Lake, and then Mud Lake, we used to call the other one.

Q. Always known by those names? A. We used to call Hyde Lake Cassidy Lake, and Mud Lake—I believe they call Mud Lake Lake George now.

MR. GREGORY: What did you call Hyde Lake? Cassidy Lake? A. Cassidy Lake, yes, sir.

MR. BENNETT: Was there a man by that name living there

then? A. He used to live in the Chittenden place before Chittenden—old man Cassidy.

Q. Was there a man named Hyde living there at any time? A. On that place?

Q. A man by the name of Hyde living in that locality? A. I think there did. I don't remember.

Q. Now, Mr. Kleinman, describe, if you will, the growth of timber on this body of land between Wolf and Hyde lakes when you first examined it, as you found it, as to trees, their size and kind and location? A. Well, in the north end there was large trees, oaks, and then up towards the other end, up towards that further south cut there (indicating)—

Q. How large in diameter? A. Well, there was large trees.

Q. Any other kinds of timber? A. Down in the other way there was poplars, and I guess ash, and a lot of others.

Q. Elms? A. I think so.

Q. Basswood? A. There may be. I never paid much attention to the different kind of wood there.

Q. How were they distributed from the north to the south, over this body of land between the two lakes? A. How it was distributed?

Q. Yes, sir. Commencing at the north end, where was the largest grove? A. In the north end.

Q Proceeding south, how large was the timber? A. In the south end, it grows to different kinds of timber, poplars and such kind.

Q. Was the timber near the center referred to on this map "C" by the word "McDaid"—was there timber there when you first knew it? A. There was a couple of spaces where there ain't no timber.

Q. Where was that? A. Up by that south slip there is no timber there—that cut through there—I don't know what you call it. There used to be a ditch cut through there, where we used to go through from one lake to the other.

THE COURT: You say south of that ditch there was no timber? A. No, sir; not right close to the ditch, and on neither side of that ditch within—oh, I don't know how many yards.

MR. BENNETT: Was there timber north of the ditch a few rods? A. Yes, sir; after you got a few rods beyond there was some.

Q. Then north of the growth of timber how was it? A. North of that there was a space there, I think where that house is, where there was no timber, and then from that clean down again.

Q. How long a space was that, about? A. Oh, I should say it would be—I can't say very well now. Well, I should say there would be forty rods, anyway, something about that.

MR. STRONG: Is this space with or without timber you are referring to? A. Without timber; just grass.

MR. BENNETT: You say that you went through this ditch that

was cut south of what is marked on the map "Field" where the artificial cut is now? A. Yes, sir.

Q. Frequently? A. Yes, sir.

Q. Did it have the evidence of being cut—of being an artificial channel? A. The evidence of being cut there?

Q. Do you know when that ditch was cut? A. No, sir.

Q. When did you first go through it? A. Well, I know it was cut in 1858. There was a north ditch that we used to go through first—that I used to go through first.

Q. What was the locality of that as to where Smale lives now, which way, and how far? A. Well, it was cut through just the same like the other, and is higher, the ridge is higher there.

Q. Where is that north ditch that you speak of with respect to the north end of the ridge? A. It is south of where the Smale house is now.

Q. How far, about? A. I don't know exactly.

Q. Did you hear Mr. Gaughan's testimony to-day, with reference to a ditch there? A. That man reading that?

Q. Yes, sir. A. I heard some of it, what I could understand; I could't understand it all.

Q. Was that the same place that you refer to? A. Yes, sir; there was two ditches there, cut through. One was what we call the north and the other was the south.

Q. Referring to this map, "Jordan's Exhibit C," was this dark spot on the map going through this white colored strip and south a few rods of the south line of section 20, the locality of this last ditch that you call the north ditch? A. I don't know where them sections are, but somewhere along through there.

Q. Could you state how far the north ditch was from the south of Field's place and north of Reese's place? how far north of that?

THE COURT: The south ditch north of Field's place?

MR. BENNETT: South of Field's place and north of Reese's place? From the ditch south of Field's place and north of Reese's place? A. Mr. Reese's place is a good ways south; a good ways south of the south ditch.

Q. How far was one ditch from the other? A. Well, I should say that is half a mile, somewhere about that.

Q. Do you know when the north ditch was made? A. No, sir.

Q. What was its condition when you first knew it? A. Dug out.

Q. Could you drag a boat through? A. Yes, sir; sometimes it would go pretty near dry. I have seen it altogether dry so you would have a boat but very seldom.

Q. Could you ever float a boat clear through that ditch—the north ditch? A. Yes, sir; without any trouble, in high water.

Q. How long did that ditch remain? Is it there now? A. Well, I don't know as the same ditch—I don't believe that north ditch—it is there yet, but I don't think it is open, I don't think it is. I think it was not a year ago, but it was for—to 1861, it was always open, from 1857 to 1861.

Q. You don't know since 1861? A. I know it was from 1857 to 1861 always open.

Q. Have you used it since 1861? A. No, sir; I have not; not since 1861, but I walked up through there, one time, and I think it is kind of closed up there—about a year ago.

Q. Has there always been, since you knew that property, a continuous body of land between Wolf and Hyde lakes from north to south, from the De Witt tract, marked on this, to the Reese tract? A. Yes, sir; there has always been land through there. In the spring, probably, it would overflow and lay, in some places, in very high water. The water sometimes raises a good deal.

Q. Was the north ditch a natural or an artificial ditch? A. It was cut—an artificial.

Q. How do you know that? A. You could see by the way the sand was thrown up there—dug out.

Cross-Examination by Mr. Gregory.

Q. When did you first know that north ditch? A. Well, I knowed that north ditch anyhow in 1857.

Q. At that time was it possible to get through that ditch from one lake to the other in high water? A. Yes, sir.

Q. In a boat? A. Yes, sir.

Q. At that time, in 1857, was the south ditch, that you have spoken of, also open? A. It was in 1858, I know.

Q. It was in 1858? A. Yes, sir; I know after we went up there, anyhow, in 1858, it was open.

Q. Then your recollection is that in 1857 the north ditch was open, but you don't remember that the south ditch was open until 1858? A. No, sir.

Q. Do you know anything about who opened that north ditch? A. No, sir; only I had heard say, I don't know who opened it.

Q. Who opened the south ditch? A. I don't know.

Q. Did you ever know J. Claude Hill? A. Well, I knowed the Hills that used to live over there, some of them.

Q. A hunter there, did you know him? A. Yes, sir; he used to hunt; used to live over there.

Q. Did you ever see him around there hunting? A. I don't know as I ever seen him hunt. I know Hill's place, and know some of the folks, but the other boys knew them better.

Q. I understood you to say that in the spring, in times of high water, there would be places where the water would flow over this land, from one lake to the other, in the low places? A. Well, right at these ditches, at the south ditch it would.

Q. How wide, in extent, there? A. Oh, probably,—not very wide. I never seen it very wide.

Q. Well, how wide? A. I have seen it so as to overflow there, say two or three rods, maybe, on each side, two or three rods, just right on where the land would be,—

Q. How deep would it be at the side of the ditch? How deep would the water be? A. Well, I could not tell.

Q. Well, approximately? A foot or two feet? A. No; I don't think it would ever be that deep. I don't think it was ever down that deep.

Q. Well, what was it? A. Well, say five or six inches. There used to be grass there, too.

Q. You are familiar with the house known as the Field house? A. That is, you mean the one—

Q. Just north of the south cut. A. Yes, sir; I know where that house is there.

Q. You are also familiar, I judge, with the Smale house? A. Yes, sir; I know where it is.

Q. That is, up towards the north end of the strip of land? A. Yes, sir.

Q. I will ask you to state if there is not a place about 40 rods south of Smale's house, possibly a little more, where there is a break in the timber? A. Yes, sir.

Q. Quite a wide place? A. Yes, sir; I guess anyhow forty rods—a little more.

Q. Are you familiar with this map to which your attention has been called, and referred to in the testimony as "Jordan's Exhibit C," this map in which the waters of the lake are shown in blue? A. Yes, sir.

Q. Would the point where I now indicate, being a place where the very light coloring, nearly white, perhaps, stops, south of Smale's house, would that be the place where there is the break in the trees to which you refer? A. Where is Smale's house?

Q. There is Smale's house (indicating). A. Yes, I see.

Q. And then the point which I indicate, which is by measurement, the south end of it, about 20 rods, I think, north of the south line of the section? A. Yes, sir.

Q. Would that be the place, as you remember it? A. It would be somewhere in there, yes, sir; it would be lower here.

Q. How much lower is it there? A. Than the ridge below that down by the house?

Q. Than the ridge generally, yes, sir. A. Well, I should say it would be two or three feet lower there than it is up near that ridge, especially where that timber is.

Q. In times of very high water, is it wet in there? A. I have seen it wet in there.

Q. How much water have you seen there, in times of high water? A. Well, it might be six inches, probably, or a foot; something like that. It is kind of wet across there.

Q. From one lake to the other through this point? A. Yes, sir; seems kind of wet through there; yes, sir.

Q. The timber continues along, and continues to a ridge after it commences again south of this point to McDaid's place, does it not? A. Yes, sir.

Q. It is, perhaps, I should suppose, something like 80 rods

north of the Field house, where the timber stops again on the north? A. Yes, sir.

Q. What is the character of the land between the place where the timber stops, as I said, approximately, showing from this map about 80 rods north of the Field house, down to within a short distance of the Field house from the north—what is the character of the land intervening? A. Well, there is a lower place in there too, near that slip. I think it is further down.

Q. Is there a lower place further north of the Field house also, or was it before the railroad was built? A. There is a place—the way I understood it then, that that would be about so many rods south of Smale—you asked me that first, didn't you?

Q. I first call your attention to the place where there is a break in that timber on the ridge on which Smale's house is situated? A. Yes, sir.

Q. And perhaps 60 rods, we will say, south of Smale's. Now, I call your attention to the fact that the timber commences again on the ridge at this low place referred to, and runs along, as I understand, down to a point about 80 rods north of the Field place? A. Yes, sir; well, what I mean is the low place is just north of that Field house.

Q. There is a low place just north? A. Yes, sir; I don't know about that up yonder (indicating on map), I think that is high. I was thinking you got me way down yonder (indicating).

Q. Now you say you don't know whether there is any low place? A. No, sir; I did not.

Q. South of Smale's, or any break in the timber? A. Yes, sir; there may be a break in the timber, but I don't think it is very low in there. The lowest place, in my opinion, is down in there (indicating).

Q. Then the point to which your testimony refers when you say that you have seen perhaps six inches of water across between the two lakes, is a point a little north of the Field house? A. Yes, sir; right there close to the Field house.

Q. Do you remember what years there was particularly high water? A. No, sir; I do not.

Q. Have you any knowledge as to how the water levels in these lakes compared with the levels of Lake Michigan? A. Well, they compare, I suppose, in the summer about level, because they don't seem to run, but in the springs, sometimes they are higher—run off. You see, they vary.

Q. In the spring Wolf and Hyde lakes are sometimes higher than Lake Michigan? A. Yes, sir.

Q. And run off into the lake? A. Into the lakes; yes, sir.

Q. You say you have seen no change in the amount of water in this region since you have first known the land? A. I think the water is lower than it used to be.

Q. Is not the water lower now than it was many years ago? Hasn't it been the last few years? A. I think so; I think it is

lower; I think the water is a little lower, taking the season through, than it used to be.

Q. Is not that the case with most other low land that you are familiar with around Chicago? A. Yes, sir.

Q. The longer you have known it the dryer it seems to get? A. Yes, sir.

Q. No sudden change, I suppose, is there? A. No, sir.

Q. But it is gradual? A. In my opinion, it seems to me that out in that section that the water is gradually a little lower every year than what it used to be. Of course there will be exceptional years. There has not been as much snow these last few years. You take years when there is a great deal of snow, and I think it makes the water higher.

Q. Do you remember the time the Calumet was dammed up in 1885, some way by the ice, and the water set back over that country, the spring of 1885? A. I remember of running over our potato patch in the spring with a boat.

Q. Where is that Chittenden's bridge? A. Below; a mile below.

Q. Have you known the water to be so high you could take a boat across this point of Field's house, between the two lakes? A. No, sir; I do not. I never went across that there, and I have seen the water pretty high there, but we would always take the ditch, because there is grass there and you could not get through with a boat, but I have seen the time you could go through where we raised potatoes, easy enough with a boat; there was no grass.

Q. You don't remember anything about there being any depression here south of Smale's house, we will say sixty rods? You think there is perhaps a break in the timber? A. Well, I have been there a great deal, but that ridge runs up there quite a ways from his house, and then the break, I think, is nearer that other house.

Q. There is a big break there? A. Yes, there is a big break. There may be a little break down below.

Q. I suppose, in times of high water, this strip of land in between there looks much narrower than it does now, Mr. Kleinman, of course? A. Yes, sir.

Q. Comparatively low land? A. Yes, sir; it gets narrower, of course.

Cross-Examination by MR. DENT.

* * * * *

Q. Did you ever observe in going over to that point east of Hyde Lake, between Hyde Lake and Wolf Lake, the breadth of the ridge? A. Yes, sir. I suppose it is—

Q. Just of the ridge itself, not of the low land? A. Just of the ridge?

Q. Yes, sir. A. Oh, it would not be over—that is, some on our place is not over six or seven rods—probably from five to six rods.

Q. Very narrow in many places, wasn't it? A. Yes, sir; very narrow.

Q. And was it not also irregular? A. Yes, sir.

Q. In shape? A. Yes, sir.

Q. Some kinds of trees grew there very rapidly, didn't they? A. Yes, sir; seemed to.

Q. Did you ever pass over that low place in a wet time over to Hyde Lake, from your house east to Hyde Lake? A. Over to Hyde Lake?

Q. Yes, sir; did you ever pass over that low place? A. Yes, sir; from the river over to Hyde Lake, I have; yes, sir.

Q. In time of high water? A. Yes, sir.

MR. BENNETT: In what locality?

THE COURT: From the river to Hyde Lake, he says.

THE WITNESS: At the north end of the lake.

MR. DENT: Was there a good deal of water in that region, right through that low space there? A. Sometimes; in real high water we would have to pole a boat some of the way.

Q. How soon would you strike Hyde Lake in passing over from your house, what distance would you have to go? A. Well, it is about a mile.

* * * * *

Q. Did you go through there with boats as well? A. Yes, sir; very often.

Q. Through to Hyde Lake? A. Yes, sir.

Q. And did you also pass from Hyde Lake over to Wolf Lake? A. Yes, sir.

Q. Frequently? A. Yes, sir.

Q. Found water enough for your boat, did you, in passing? A. Yes, sir; not always. Sometimes I would have to pull across where these cuts are, in the falls especially, and with ducks in my boat I could not get across; sometimes be dry. I know one night Charlie Reese and William Reese helped me pull a lot of ducks across there. I was about played out. I had seventy-two ducks; most of them red-heads.

Q. Did you know Wolf River? A. Well, some calls it Wolf River—down below there, at the mouth?

Q. Yes, sir. A. Yes, I know where it is.

Q. Did you know how the water in that was, whether there was an outlet through to Lake Michigan—an inlet? A. Yes, sir; there had been some in the springs, a good many years ago. I don't remember of any there for—

Q. What did you observe with reference to the water flowing out of Wolf Lake, through that outlet, or flowing into Wolf Lake from Lake Michigan? A. I don't know as it ever flowed in. It barred up always after the spring water would run out, flow out, and then it would bar up again, so you could drive along the lake.

Q. You noticed it open sometimes, didn't you? A. Well, it

used to be cut open in the springs. They would let the water out, some people that lived up that way.

Q. When it was cut open that way, and the wind would come in the right direction across the lake the water would flow in, wouldn't it, into Wolf River and Wolf Lake? A. Well, not much; it would bar it up generally; that is, if it got to running down, it would bar it and fill it up.

Re-direct Examination by Mr. BENNETT.

Q. You were asked by Mr. Gregory, in reference to whether or not there was a low place some forty or fifty rods south of the Field house and Smale house, and whether there was a break there? A. Yes, sir.

Q. In your first answers, you mistook the locality, further south? A. Yes, sir.

Q. Now, as to this locality designated, did you ever see any flow of water there from lake to lake? A. Blocked all up.

Q. Up at the other place? A. No, sir. That was the reason I was thinking it was down below there.

Q. During your acquaintance with this locality, did you ever know the locality of the Field house to be called Elm Island? A. No, I don't remember to that.

Q. You say the water is lower latterly—this year. Has that in your judgment been caused by the cutting of this slip from Chittenden bridge into Hyde Lake? A. Has what?

Q. The cutting of this slip by the dredge through Chittenden Creek south and then easterly into Hyde Lake—would that have the effect of producing low water there—lower the water? A. Well, I think it will help lower it, yes; sir.

Q. Did you ever see the water flow from lake to lake across the low place you have spoken of north of Field's and south of the first clump of timber, north of that—ever see the water run from lake to lake? A. No, sir; but I seen the water run on the land there, over the grass.

Q. That is, on the land, I mean? A. Yes, sir. But I never seen it run across.

Friday, November 13, 1891. Court met at 10 o'clock A. M.

A. S. KLEINMAN, a witness called on behalf of defendant Jordan, being duly sworn, testified as follows:

Direct Examination by Mr. BENNETT:

Q. What is your name? A. A. S. Kleinman.

Q. Where do you now reside, Mr. Kleinman? A. 112th street, Cummings, on the old Shipman road.

Q. How long have you resided there, or when did you come there to reside? A. We first came there along in the fifties, 1857 or 1858, up there.

Q. Do you reside here in the city now? A. No, sir; I live out there. We first moved up there in about 1857 or 1858—1858 or 1859—somewheres along there; I couldn't tell what time.

Q. You say up there. State where that was, with reference to Chittenden's bridge? A. That is about a mile and a half this side of Chittenden's bridge.

Q. On the Calumet River? A. Yes, right near the river.

Q. Which bank, the east or west bank of the Calumet? A. West.

Q. Where did you live before that? A. South Chicago.

Q. How long before 1857 had you lived at South Chicago? A. I think my father moved there in about 1846.

Q. How old were you then? A. About 3 years old; between 3 and 4.

Q Did you become acquainted with Hyde Lake and the body of land lying east of Hyde Lake, between Hyde and Wolf lakes, at any time? A. Yes, I have been through there, over that ground, a good many times.

Q. How long ago did you first know it—what year? A. I think somewheres along in 1858—1857 or 1858.

Q. Did you know it before you moved from South Chicago towards Chittenden's bridge? A. Yes, sir.

Q. How long before? A. Well, I couldn't tell you.

Q. Well, about? A. A year or two.

Q. What did you do in that region by means of which you became acquainted with the locality? A. I was over there hunting.

Q. Did you go there hunting while you lived at South Chicago? A. Yes, sir.

Q. How often? A. I could not tell you that.

Q. About how often? How many times, if you remember? A. I know I couldn't tell that, how often I went over there. We used to go over there often shooting, that way, in the fall.

Q. Well, what would you do down there by means of which you became familiar with the land between the two lakes, Wolf and Hyde lakes? A. Well, I used to go in there—after we moved up there we used to go up through the channel and go over through there. We used to have to pass through there always when we went over there shooting to Wolf Lake.

Q. What were you doing when you went down there? A. Hunting and fishing.

Q. You fished, too, did you? A. I used to take fishermen over there.

* * * * *

THE WITNESS: I was speaking about going from this channel here from the river and across around; then we went over into Hyde Lake; we had to go to the north here to the cut—the old channel—to go into Wolf Lake.

* * * * *

Q. Was it an artificial channel or a natural channel? A. It had been dug there by somebody.

Q. Was there evidence of that? Did the channel itself show where it had been dug? A. Yes, you could see where it was dug through the ridge.

Q. When was that channel closed, do you remember—ceased to be a channel? A. I don't think it was used any more after they cut the south channel.

Q. Was there a ridge there where it was cut which showed that it was an artificial channel, the west end and towards Hyde Lake? A. Yes, sir.

Q. Poplars growing on the ridge, were they? A. Timber growing there.

Objected to.

Q. Were there any trees growing on the ridge—large trees? A. Yes, sir.

THE COURT: Where it was cut through, he means? A. On both sides of it.

MR. BENNETT: Now, when you first knew the dividing land between Wolf and Hyde lakes, was there any natural connection of the waters between the two lakes? A. No, sir.

Q. Was there any until the channel that you have referred to was cut there through, down towards Reese's? A. Not that I know of.

Q. Except the one north temporarily? A. No.

Q. Now, when was the channel north of Reese's cut through, and south of what is called the Field place? It says on the map "Field." A. I couldn't give you the time.

Q. About when—your first recollection of it? A. Some time in the sixties; I couldn't tell you what time.

MR. GREGORY: Before the war or after? A. It was cut after, I think, or during the time of the war.

THE COURT: I don't hear what you say? A. It was either cut after or during the war, I couldn't tell you which.

Q. Did you know that locality between the Field house and Reese's when there was no channel there? A. Yes, sir.

Q. What opportunity did you have in that particular place of knowing there was no channel? A. I have been up and down through there.

Q. Between the two lakes? A. Yes, sir.

Q. What was the condition of the timber on that dividing body of land when you first knew it as compared with now, or independently, what was the condition of that timber? A. Well, there was more timber on that ridge than there is now. There has a good deal of it been cut off.

Q. Was there timber in more places than there is now? A. Well, I haven't been over there lately; I don't know how it is just now.

Q. What as to the size of the timber, how large trees were

they? A. Well, there were some good sized trees on that ridge, down there towards that old channel.

Q. Was there any game on that dividing land at the time that you first knew it besides fowl? A. Do you mean that ridge right there?

Q. The body of land between the two lakes? A. There used to be deer, used to go down there north of that channel and up through there.

Q. You say they used to? A. I have drove them up through there; I have started them down towards the mouth of Wolf River in that timber and chased them up there.

Q. I will ask you, Mr. Kleinman, whether in Wolf Lake, east of the Field house, there was ever an island of wild rice, or is there now, east and northeast? A. There is one just northeast of the Field house, a little north, and just east.

Q. How far off? A. Well, the south end of it comes within, or used to come within, I guess, forty or fifty yards of the shore.

Q. How long has that been there—ever since you knew it? A. Yes, sir.

Q. Were you in the habit of going to that island? A. Yes, to take a stand there to shoot ducks.

Q. Did that island have any name? A. Yes, sir.

Q. What was it? A. I always called it Elm Island. That is what the hunters knew it by.

Q. That was applied to the island where wild ducks were shot, was it? A. Yes, sir.

Q. Did you ever hear the ground where the Field house is now located, where there were elm trees, was that ever called an island—Elm Island? A. Not to my knowledge. We always called it—that is what we got the name from; we used to call that rice bog Elm Island.

Q. Elm Island was called then from this rice bog where hunters used to hunt wild duck, opposite Field's place? A. Yes, take a stand.

Q. In Wolf Lake? A. Yes, sir.

Q. Did you ever see that body of land between Wolf and Hyde lakes when the land wasn't there? Did you ever see that locality when there was not land between Wolf and Hyde lakes? A. I have seen it when we have had freshets there. In freshets I have seen the water up over that.

Q. Otherwise than the temporary surface water on the intervening land, did you ever see it when it was water? A. Not only when we had a freshet—high water.

Cross-Examination by Mr. Gregory.

Q. Where did you see the water when the water was very high? A. Why, I see it all over that country pretty nearly.

Q. Saw it where? A. You could see it all over that country when we had our freshets down there.

Q. Did it cover the land between the two lakes pretty well? A. Yes, when we had a freshet, high water, you could take and start from there and go clear into Calumet Lake.

Q. How is that? A. I have seen, whenever we had a freshet there, you could start from there and go clear over into Hyde Lake with a boat.

Q. Start from where? A. From Wolf Lake into Hyde Lake.

Q. Go in a boat almost anywhere on this strip? A. Yes, go clear over.

Q. Go from Wolf Lake clear over to the Calumet River? A. Calumet Lake.

Q. Calumet Lake? A. Yes, when we had high water—the spring freshets, I have seen it.

Q. Did that happen most every spring, or only when the water was very high? A. Well, we used to have it there most every spring, years ago.

Q. But the actual water seems to be receding a little, don't it? There seems to be more land? A. No, sir; I don't know as it does.

Q. How long since you have been familiar with that country? A. Well, I have been familiar with that country up to the last five or six years.

Q. What I mean is, I understood you to say just now, in fact, that in old times the water used to get so as to flood this strip almost every spring? A. Whenever we got a high freshet, yes, it used to flood all that country out there.

Q. But the last few years, I want to ask you whether the water was a little lower? A. In the last four or five years we haven't had any heavy snow storms up that way, haven't had any high waters. The last high water we had there was when it washed the Nickel Plate road out there—just south, way up south, between there and Hegewisch.

Q. When was that? A. I was just trying to think; about five or six years ago.

Q. Now, Mr. Kleinman, have you yourself ever rowed or pulled a boat, or pushed it, or poled it across this intervening land, between these two lakes? A. Not without having to get out and pull it, some parts of it.

Q. Not without? A. Not without having to get out and pull it over some parts of it.

Q. You then never went yourself from Wolf Lake clear to Calumet in a boat, across, in time of freshet? A. No, sir; not right clear through. I have went all through that country, yes.

Q. Now, was the Field house down here when you used to hunt; it was not, was it? A. Not when I first used to go there.

Q. When you used to take this stand for ducks, you say the Field house wasn't there? A. Not when I first used to go there; no, sir.

Q. Then there was an island, you say, northeast—about forty rods northeast of where the Field house now stands? A. Yes, sir.

Q. That was called Elm Island? A. Yes, sir.

Q. There was not any elms on it? A. No, sir; but that is the way it got the name. Whenever a hunter was going over there, you would ask him, "Where was you shooting to-day?" and if you asked him—any one that undersood about there—he would say he stood on Elm Island. That was the way we called that rice bog—"Elm Island."

Q. That island is not shown on this map, is it? A. No, sir; I can't see it.

Q. What has become of that? A. It is there yet, part of it.

Q. You say it is there yet? A. It was the last time I was over there.

Q. Was it high or low ground? A. Why, it is a regular rice bog—mud.

Q. I suppose in high water the water came pretty well through here, so as to surround the place where the Field house now is, didn't it, in times of freshets? A. Yes, sir.

Q. And there were elms on that? A. Yes; they have always been there, as long as I can recollect.

Q. What is your first name, Mr. Kleinman? A. Abraham.

KELLAM SMITH, a witness called on behalf of the defendant Charles E. Rand, being duly sworn, testified as follows:

Direct Examination by MR. KENDALL.

Q. How old are you, Mr. Smith? A. Fifty.

Q. Where do you live? A. I live near Hegewisch, on section 30.

Q. What is you occupation, Mr. Smith? A. Well, I follow the business of buying furs, in the winter time, as a general thing. In the summer time I have been keeping hunters' boats, fishing tackle—doing a little kind of a sporting house business.

Q. How long have you lived on section 30? A. Since the 9th day of May, 1880.

Q. How near to the Indian Ridge road, so called, did you live? A. Sixty feet.

Q. Have you always been living in the same house or place? A. No; when I first went there I went into a house that subsequently collapsed, and then I built a new house. I am living in the same one I built.

Q. Is it on the same ground where it was built? A. I moved one block.

Q. In which direction? A. South.

Q. How near to the Indian Ridge road was this house that you first lived in? A. About 120 feet.

Q. Do you know where that house was situated with reference

to the section lines of section 30? A. Well, I don't know exactly.

Q. Approximately? A. But I haven't got that measurement in my head. It is about 100 feet from the corner; it may be 125 feet.

THE COURT: Q. The present house? A. Where I first went.

Q. From which line of the section? A. From the north line.

Q. About one hundred and how many feet? A. Oh, probably 125.

Q. South of the north line of the section? A. Yes, sir.

Q. And about how far from the Indian Ridge road? A. About 120 feet to the back part. I think about sixty-five or seventy feet from the Indian Ridge tract, the whole tract; about seventy feet, I guess.

THE COURT: I thought you said 120 feet. A. No; 120 feet from the other one. I built it further forward, the second house.

MR. KENDALL: Q. Do you know who occupied that house that you first moved in before you moved into it? A. Yes; Mr. Rushmore occupied the house.

Q. When did you first occupy that house? A. The 9th day of May, 1880.

Q. Were you a tenant of Mr. Rushmore? A. Yes, sir.

Q. Under a lease from him? A. Under a lease, yes.

Q. How long did you continue to live in that house as a tenant of Mr. Rushmore, or Mr. Rushmore and others? A. Well, I built the house I am now in five years ago this September; this last September.

* * * * *

Q. What business did you carry on? A. I followed the keeping of a sportsman's house, where I kept boats to rent. There was plenty of water for that purpose.

* * * * *

Q. Do you know where the so-called meander line of the west shore of Hyde Lake as located by the government surveys of 1835 and subsequently of 1874, is? A. I know where the corners are.

Q. Do you know how near that line comes to the house in which you originally lived, on lot 1? A. It was about thirty feet from the first house.

Q. In which direction? A. It was on the west.

Q. The line was about thirty feet west? A. West of the first house.

Q. How near does that meander line come to the Indian Ridge road, so-called, as it is used? A. I think the wheel track would be twenty-five feet.

THE COURT: Twenty-five feet east to the meander line? A. Yes, east.

MR. KENDALL: Q. How far west of your house did the meander line run? A. Where the house stands now.

Q. The old house? A. As it stood, it would be about four feet nearer, the second house would.

Q. The first house? A. The first house was about thirty feet; the second house takes up four feet nearer.

Q. You say you kept boats as a part of your business during the time you lived on this land? A. Yes, sir.

Q. Whereabouts, with reference to your house, did you keep the boats? A. They had to be east, in the lake.

Q. How far did you keep your boats from the house, to moor them? A. Sometimes tied them at the door, had to, to get out myself.

Q. How near did the house in which you lived there in the first place, come to the water of Hyde Lake, or did the water of Hyde Lake come? A. Right up against it.

Q. How near did it come to the second house after you built that, the second house that you lived in? A. Well, that house was built higher, the second house.

Q. Raised above the level, do you mean? A. The second house was built two feet higher and the water never disturbed it, because it was built further forward and the groundwas graded in.

Q. Built nearer the road? A. Yes, and graded in, into the land, and made land, higher and solider, had to be.

Q. What was the character of that land on the west shore of Hyde Lake, the northeast of section 30? A. It is very boggy.

Q. What grows on the west shore of that lake in that tract? A. A little spin grass.

Q. A pretty thin cut? A. Yes, sir.

Q. What is the character of the ground underneath the grass roots? A. Sixteen inches below the grass there is solid bottom, but it is sand.

Q. At what point? A. On the west shore over across the line —the west side of the railroad track, it measures sixteen inches, generally, the depth to the sand, loose muck.

Q. Where do you locate the west shore in giving this testimony— nearly to the meander line? A. Well, that South Chicago & Southern Railroad is running right along between what we call the black grass and the wetter ground further west.

Q. When you say it is about sixteen inches down to the sand at what line do you have reference to?

THE COURT: The west half of the lake? A. Yes, the west half.

Q. The west half of Hyde Lake, the west side, the grass is spin grass and about sixteen inches of mud on sand? A. Yes, sir. East of the railway there is a good deal more mud.

Mr. KENDALL: Q. I don't care about going east of the railroad. How deep would the muck be a few rods further east from the shore where you say it is sixteen inches to the sand? A. Well, where I have set fence posts it runs an average of about sixteen inches, all the way from the railroad track from the front line,

from the meander line east to the railroad track, which I think is pretty close to three hundred feet, that strip of land there, three hundred feet wide, I think.

THE COURT: You say it is muck all the way? A. Yes, sir.

Mr. KENDALL: Q. What sort of walking or footing was it over that muck, as a general thing, during the period you have known it? A. It has been pretty treacherous; not very solid.

Q. Were you in the habit of tramping over it? A. Oh, I generally staid off of it. Once in a while I would have to go in there after a mallard duck, or something.

Q. What kept you from sinking when you undertook to walk there yourself? A. Well, you would have to be very careful where you would step and catch on the best bog.

Q. How high is the traveled road known as the Indian Ridge Road above the level of this lake? A. Well, it is not regular all the way, but the general average, I guess, would be four or five feet.

Q. I mean on the line of the northeast quarter of 30, the line of this lot which you occupy? A. Well, it would be four or five feet, I guess, above the level.

* * * * *

Cross-Examination by MR. DENT.

Q. You have lived in two houses, Mr. Smith, down there? A. I have; yes.

Q. And the second house is about a block south of the first one? A. It is now.

Q. Nearer the meander line, I understand you? A. Not any nearer.

Q. Didn't I understand you that the first house was about thirty feet east of the meander line? A. Yes; and the second house wasn't only four feet nearer.

Q. So the second house is nearer the meander line than the first one? A. It always was; I built it in front.

Q. You said that the first house collapsed. When did it collapse? A. In 1885.

Q. How long had you been living in it then? A. I went into the house the 9th of May, 1880.

Q. What made it collapse—what was the matter with it? A. I think that the underpinning gave out.

Q. Did the water come up into it? A. Oh, yes.

Q. The water surround it? A. Clear around it.

Q. Did the water raise it up some, the underpinning? A. No, sir; the house went down.

Q. The foundations were not very good? A. The foundations wasn't good enough; they gave out.

Q. Did the ice have anything to do with the unsettling of the house? A. I don't think it did.

Q. There was ice under it, wasn't there? A. Yes; there was ice in it.

Q. And around it—all around it? A. Oh, yes.

Q. The lake was right there? A. The house was originally built in the lake.

Q. Did you find a higher spot when the second house was built? A. Went to work and made one.

Q. How did you make it? A. I took the horse, took a team and a scraper.

Q. You raised the ground up some, did you—graded it? A. I raised it twelve inches.

* * * * *

And thereupon the defendants Gertrude H. Hardin and the Cook County Canal and Dock Company, to maintain the issues on their part, introduced the following evidence, to wit:

Patent to John Holbrook.

(4–430.)

THE UNITED STATES OF AMERICA,

To All to Whom These Presents Shall Come, Greeting:

Certificate }
No. 4958 }

WHEREAS, John Holbrook of Cook County, Illinois, has deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Chicago, whereby it appears that full payment has been made by the said John Holbrook, according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the southeast fractional quarter and the east fraction of the southwest fractional quarter of section nineteen, the northeast fractional quarter and the east fraction of the southeast fractional quarter of section thirty, in township thirty-seven north, of range fifteen east, in the district of lands subject to sale at Chicago, Illinois, containing one hundred and fifty acres and ninety-eight hundredths of an acre, according to the official plat of the survey of the said lands, returned to the general land office by the Surveyor General, which said tract has been purchased by the said John Holbrook.

NOW, KNOW YE, That the United States of America, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT, unto the said John Holbrook, and to his heirs, the said tract above described; TO HAVE AND TO HOLD the same, together with all rights, privileges, immunities, and appurtenances, of whatever nature, thereunto belonging, unto the said John Holbrook and to his heirs and assigns forever.

IN TESTIMONY WHEREOF, I, John Tyler, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the twentieth day of May, in the year of our Lord one thousand eight hundred and forty-one, and of the independence of the United States the sixty-fifth.

By the President,

JOHN TYLER,

[L. S.] By R. TYLER,

Secretary.

J. WILLIAMSON,

Recorder of the General Land Office.

Recorded, Vol. 10, page 348.

Department of the Interior, General Land Office.

Washington, D. C., January 27th, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of Patent in favor of John Holbrook, founded on Chicago, Illinois, Cash Entry No. 4,958, is a true and literal exemplification from the record in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

N. C. McFARLAND,

[L. S.] *Commissioner of General Land Office.*

Register's Receipt to John Holbrook.

No. 4958. Land Office, Chicago, Ills., December 24, 1838.

IT IS HEREBY CERTIFIED, That in pursuance of law, John Holbrook, of Cook County, State of Illinois, on this day purchased of the Register of this Office, the lot or South East fract quarter containing seventy-nine acres and eleven hundredths and East fraction of the South West fractional quarter containing forty-one acres and nine hundredths of Section Number nineteen—North East fractional quarter, containing twenty-eight acres and seventy-four hundredths and East fraction of the South East fractional quarter, containing two acres and four hundredths of Section number thirty in township number thirty seven N of range number fifteen East containing one hundred and fifty and ninety eight hundredths acres, at the rate of one dollar and twenty-five cents per acre, amounting to one hundred and eighty-eight dollars and seventy three cents, for which the said John Holbrook has made payment in full as required by law.

Now Therefore Be It Known, That, on presentation of this certificate to the Commissioner of the General Land Office, the said John Holbrook shall be entitled to receive a patent for the lot above described.

J. M. STRODE,

Register.

Department of the Interior, General Land Office,
Washington, D. C., Nov. 5th, 1891.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed certified copy of Chicago Cash Certificate No. 4958, in favor of John Holbrook, is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

THOMAS H. CARTER,
[L. S.] *Commissioner of General Land Office.*

(Schedule of conveyances showing in part the chain of title from John Holbrook to Gertrude H. Hardin:

Deed, dated January 3, 1844, John Holbrook and wife to Wm. Canterbury, conveying south half of all lands described in the patent.

Deed, dated April 25, 1849, Wm. Canterbury and wife to Alonzo Shepherd

Deed, dated January 7, 1859, Alonzo Shepherd and wife to Daniel Gregg Smith.

Deed, dated December 14, 1859, Daniel Gregg Smith and wife to Virgil H. Lyon.

Deed, dated April 28, 1870, Virgil H. Lyon and wife to Isaac N. Hardin.

Deed, dated November 12, 1869, Betsy N. Holbrook, widow, Gertrude H. Hardin, only child and heir of John Holbrook, deceased, and Isaac N. Hardin, her husband, to Paul Cornell, conveying all lands described in the patent to John Holbrook.

Deed, dated December 9, 1869, Paul Cornell and wife to Isaac N. Hardin, conveys south half of southeast fractional quarter and south half of east fractional southwest quarter of section 19.

Deed, dated June 20, 1870, Paul Cornell and wife to Isaac N. Hardin, conveys north half of lands in section 19 and all in section 30.

Deed, dated December 9, 1869, Isaac N. Hardin and wife to Joseph Hartwell, conveys south half of land in section 19.

Deed, dated June 21, 1873, Joseph Hartwell and wife to Isaac N. Hardin, conveys same as last above described.

Deed, dated December 18, 1874, Isaac N. Hardin and wife to Henry S. Monroe, conveys all described in patent to John Holbrook.

Deed, dated December 18, 1874, Henry S. Monroe to Gertrude H. Hardin, conveys all described in patent to John Holbrook.)

ISAAC N. HARDIN, one of the defendants, called on his own behalf, having been first duly sworn, testified as follows:

Direct Examination by MR. DENT.

Q. Please state your name and residence? A. My name is Isaac N. Hardin. I reside in Evanston, in this county.

Q. Were you acquainted with the late John Holbrook, who has been mentioned here—mentioned in the pleadings in this case? A. I was.

Q. How are you related to him, if related to him? A. I married his daughter.

Q. State when he died? A. He died in 1866.

MR. GOUDY: Wait one minute; I want to object to Mr. Hardin as a witness; Mr. Dent has not asked him to find out who he is yet, but he is the husband of Mrs. Hardin, who is the party in this suit. The question is whether he is a competent witness to testify in the case where his wife is a party.

THE COURT: Is the complainant his wife?

MR. GOUDY: She is a defendant to Shedd's petition, and then files a cross-petition.

MR. DENT: We only want to prove heirship.

THE COURT: I think it is admissible.

MR. GOUDY: There ought to be a foundation for my objection.

MR. DENT: We admit, of course, that Mr. Hardin is the husband of this lady.

Q. Was he a married man? A. Yes, sir.

Q. To whom was he married? A. My wife's mother's name was Betsy N. Holbrook.

Q. Did he have any children by his marriage? A. He had only one, my wife.

Q. Who is she? A. She is now my wife.

Q. What is her name? A. Gertrude H. Hardin.

Q. Is Mrs. Holbrook living, the mother of Mrs. Hardin? A. She is dead.

Q. Was there any other child or children or descendants of child or children left by Mr. Holbrook? A. No, sir.

Q. Or by Mrs. Holbrook? A. No, sir.

Q. When did Mrs. Holbrook die? A. In 1885.

Q. Mr. Hardin, do you know whether Mr. Holbrook died testate or intestate? A. He died intestate.

Patent to William B. Egan.

(4–406.)

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

Certificate
No. 28979.

WHEREAS, William B. Egan of Cook County, Illinois, has deposited in the General Land Office of the United States a certificate of the Register of the Land Office at Chicago, whereby it appears that full payment has been made by the said William B. Egan, according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the public lands," for the west fraction of the southeast quarter (west of lake) of section thirty, in township thirty-seven, of range fifteen in the district of lands subject to sale at Chicago, Illinois, containing twenty-five acres and nine hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said William B. Egan.

NOW, KNOW YE, that the United States of America, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT unto the said William B. Egan and to his heirs, the said tract above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said William B. Egan and to his heirs and assigns forever.

IN TESTIMONY WHEREOF, I, Franklin Pierce, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the first day of August, in the year of our Lord one thousand eight hundred and fifty-three, and of the independence of the United States the seventy-eighth.

By the President,

[L. S.] FRANKLIN PIERCE,
By JNO. H. WHEELER,
Asst. Secretary.

J. N. GRANGER,
Recorder of the General Land Office.

Recorded Vol. 57, page 447.

Department of the Interior, General Land Office,
Washington, D. C., Nov. 9, 1891.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed copy of Patent in favor of Will-

ian. B. Egan, founded on Chicago, Illinois, Cash Entry No. 28,979, is a true and literal exemplification from the record in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

THOMAS H. CARTER.
[L. S.] *Commissioner of General Land Office.*

(Schedule of conveyances showing chain of title from William B. Egan to Gertrude H. Hardin:

Deed dated March 2, 1859, Wm. B Egan and wife to James Bell;

Deed dated March 5, 1859, James Bell and wife to James Evans;

Deed dated June 11, 1862, James Evans and wife to Edmund Burke;

Deed dated March 22, 1865, Edmund Burke and wife to Peter Rich;

Deed dated April 6, 1866, Peter Rich and wife to Wm. H. Hunt;

Deed dated June 12, 1874, Wm. H. Hunt and wife to John Parsons;

Deed dated January 19, 1883, John Parsons and wife to Wm. H. Rand and Charles R. Steele;

Deed dated December 20, 1889, Wm. H. Rand and wife, Nelson A. Steele, Nelson A. Steele, Ex'r, Margaret A. Steele, and Margaret A. Steele, Exrx, to Gertrude H. Hardin, conveying all that part of South half of Section 30, Township 37 North, R. 15, lying east of a line 80 rods east of and parallel with the north and south center line of section 30.)

Order of Consolidation in Hardin v. *Jordan.*

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Wednesday, January 17, 1883.

Present: Hon. Romanzo Bunn, District Judge.

547 GERTRUDE H. HARDIN
vs.
18197 CONRAD N. JORDAN. } Ejectment.

548 GERTRUDE H. HARDIN
vs.
18198 CONRAD N. JORDAN. } Ejectment.

549 GERTRUDE H. HARDIN
vs.
18199 CONRAD N. JORDAN. } Ejectment.

550 GERTRUDE H. HARDIN
vs.
18200 CONRAD N. JORDAN. } Ejectment.

Now comes the defendant in said four entitled causes by John I. Bennett, Esq., his attorney, and on his motion and with notice to the plaintiff's attorneys, It is ordered by the Court that said four entitled causes, wherein Gertrude H. Hardin is the plaintiff in each and Conrad N. Jordan is the defendant in each, be and the same are hereby consolidated and that they proceed as one case.

NORTHERN DISTRICT OF ILLINOIS, } ss.
Northern Division. }

I, William H. Bradley, Clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the Order entered of record in said Court at Chicago in said Division, on the Seventeenth day of January, A. D. 1883, in the cause wherein Gertrude H Hardin is the plaintiff, and Conrad N. Jordan is the Defendant, as the same appears from the original records of said Court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Chicago, in said District, this twenty-ninth day of October, A. D. 1891.

[L. S.] WM. H. BRADLEY, *Clerk.*

Transcript of Judgment entered in the Circuit Court of the United States for the Northern District of Illinois, on the 10th day of June, A. D. 1891.

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Wednesday, June 10, 1891.

Present: Hon. Walter Q. Gresham, Circuit Judge.

18197
18198 GERTRUDE H. HARDIN } In Ejectment.
18199 *vs.* } Consolidated Cases.
18200 CONRAD N. JORDAN.

Upon the filing herein of the Mandate from the Supreme Court of the United States, It is ordered that this cause be re-docketed for further proceedings and the entry of judgment for the plaintiff in conformity with the Opinion of said Court filed therein at the October term of said Court, A. D. 1890, to-wit, the Seventh day of May, A. D. 1891, a certified copy of which said Opinion has been exhibited to and examined by the court now here.

And this cause now coming on for a final disposition of the same in pursuance of said Mandate, the Court finds that the said plaintiff has a right to recover possession of the premises described in the declaration and is seized thereof as of an estate in fee simple, and it is considered and adjudged, and this court in accordance with the said Opinion, doth consider and adjudge, that the said Gertrude H. Hardin recover possession of the said premises.

And the court further in accordance with the said Opinion finds that the southeast fractional quarter of section nineteen, the northeast fractional quarter of section thirty, and the east fraction of the southeast fractional quarter of section thirty, all in township thirty-seven north, range fifteen east, as originally surveyed by the Government, were bounded by or situated on a lake which was and is non-navigable, and that the said plaintiff as owner of said several tracts had and has the rights of a riparian proprietor in respect to said lake, and that the seizin of the said plaintiff as to the two first named tracts extends to the center of Wolf Lake, and as to the east part of the southeast fractional quarter of said section thirty, the same extends to the middle of the bay or projection of the lake in front thereof.

And it is further considered and adjudged that the said plaintiff have a writ of possession for the said several parcels of land as so extending into said lake and bay respectively, and thereby take, as to said several tracts, the full rights of a riparian owner according to the said Opinion of the Supreme Court of the United States in this case. And further that the said plaintiff recover of the said defendant her costs herein expended, including the costs in said Supreme Court, taxed at five hundred and three dollars, and that she have execution therefor.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division.* } ss.

I, William H. Bradley, Clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the Judgment entered of record in said Court at Chicago, in said Division, on the 10th day of June, A. D. 1891, in the cause wherein Gertrude H. Hardin is the Plaintiff and Conrad N. Jordan is the Defendant, as the same appears from the original records of said Court now remaining in my custody and control.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this twenty-third day of October, A. D. 1891.

[SEAL] WM. H. BRADLEY, *Clerk.*

JUSTUS WILLIAM ROSENQUIST, called as a witness on behalf of the defendant Gertrude H. Hardin, was duly sworn and testified as follows:

Direct-Examination by MR. DENT.

Q. What is your name? A. My name is J. W. Rosenquist.

Q. Where do you live? A. On Indian Ridge, section 19.

Q. How long have you lived there? A. Since 1880. I came in there the 8th day of June, I think it was.

Q. Have you been living in the same house all the time? A. All the time since.

* * * * *

Q. How were the waters about the house when you went there, Mr. Rosenquist? A. The water was pretty high at times, was right up under the house.

Q. How near did they come to your house, the waters of the lake? A. It was by the house sometimes—not just the time I came. It was a little up from the house, pretty near close to the house.

Q. Your house is near the Indian Ridge road, isn't it? A. Yes, sir.

Q. How far from the Indian Ridge road is your house? A. A couple of rods, I think, from the gate.

Q. In section 19? A. Yes, sir; in section 19.

Q. Did the water come in your house sometimes, the water of the lake? A. Yes, sir. The ice break up the house once. The ice lifted it off the posts.

THE COURT: What is that? A. The ice lift the house off the posts, took it off the posts and throwed it down in the mud, and there it stand, and it was pretty near two years before he lift it up again; could not come to it, it was too muddy.

MR. DENT: Q. When was that—about when? A. I think probably eight years.

Q. About eight years ago? A. Or nine years.

Q. In what season of the year was it? A. It was in the winter time. The ice lifted it up.

Q. Early or late in winter? A. It was in the middle of the winter.

Q. How was it as to water between the house where you lived and the house where Fogli lived? You knew where Fogli lived, where Bush once lived? A. In Field's old place?

Q. Yes, sir. How was it as to the water spreading over the ground? A. Well, I can't tell that, the water spreading over the ground there. There was high water there sometimes, regular high water there, too. I was there once and there was really a lake over the whole thing pretty near.

Q. I want to know of you whether the water spread all the way over the ground? A. No, I can't say.

Q. Between your house and the Fogli place? A. No, I don't remember that. I can't say that.

Q. How near to the Fogli house did water come? A. I don't know.

Q. Whether around the Fogli house or not? You were there sometimes? A. It was pretty close to it. I don't know how far it came, how close it came.

Q. Do you remember a bridge that was over the cut south of the Fogli house, south of the Field house—we will call that the

Field house? A. Yes, sir; there was a little bridge there sometimes, and it was away sometimes.

Q. How high were the waters of the lake, or lakes, at that bridge? Did you ever notice them when they were high? A. No, I don't notice them.

Q. You can state whether the lake rose at any time so that the trees were covered, or the water was around the trees? A. No, I can't say that. I was in a couple of times, but I can't say.

Q. What caused the high and the low waters—did you observe or notice? What effect did the winds have? A. The water came in pretty fast from the north and east wind; from the north and east wind it came in most.

Q. Did the lake fill up? A. The lake fill up and the river fill up. Not now no more—before the railroad was built. They were filled up so it was standing about all over there, pretty near, and the water come up to the ridge sometimes.

Q. There has been a change since the railroad was built and since the cut was made? A. A big change.

Q. Complete change? A. Yes, sir; there is no water coming up now as it was before; it is not half so bad. It is dry land now, pretty near, and at that time it was overflowed all over.

Q. How deep was the water when your house was raised? How deep was the water about your house and under it? Did you notice? A. Oh, at that time the house fell down; many times the water got into the house. One time I moved out of the house; it was so high it stand on the top of the floor, and we must have three or four planks on top for to come on.

Q. How deep was the water just there—how high was it? A. I don't know how high the house stand.

Q. Was it two or three feet? A. It was more than three feet, I think; about three feet it was, anyhow.

Q. And you had to move into another house? A. My family moved into another house, and I be in the house.

Q. How did you get about your own house? Did you have to put down a plank? A. Yes, sir; I put a plank in the house.

MR. BENNETT: I object to leading questions so much.

MR. DENT: Q. Did you ever cross in a boat from Hyde Lake over to Wolf Lake? A. Not me.

Q. How? A. Well, I guess so. I cross in the boats a couple of times, but not what I know—yes, I have been there sometimes.

Q. Did you know where Killam Smith lived? A. Yes, sir.

Q. Which way did he live from you? A. He lived right south from my place.

Q. He lived east of the Indian Road, too, did he? A Yes, sir.

Q. How far south of you? A. I don't know how far it is; three or four blocks, I think

Q. Did you know of his having to move out on account of high waters at any time? A. Yes, sir; he moved out too. He moved

over in the bridge, over to the log house that is standing there. I guess he was over there a whole winter.

Q. Over to Chittenden's bridge did he move? A. Yes, sir.

Q. How long was he away from his house south of yours? A. I guess he was away a whole winter.

Q. When was that? A. I guess six years ago.

THE COURT: Q. About six years ago? A. More than that. Seven or eight, I think. Eight years ago, I think.

MR. DENT: Q. Well, do you know whether his house met with any trouble—whether there was any trouble there with that house too? A. With the water?

Q. Yes, the Smith house. A. Yes, sir.

Q. How? A. He had the house then, and the water got in there all the time, mostly; but in this house I guess it don't go in, for it is pretty high up.

Q. Did any trouble happen to the house Mr. Smith was living in, being thrown down by the waters, or anything of that kind? A. No; there was no trouble in the house he lives in now, for that house was a new house, built high up.

Q. But before that, in the other house? A. Yes; there was lots of trouble there. He would be sick and everything like that. He could hardly live there.

Cross-Examination by MR. BENNETT.

* * * * *

Q. You think that since the railroad has been built there has been a change in respect to the water down there? A. Yes, sir; a big change.

Q. You know that cut that was dredged there from Hyde Lake to Chittenden's bridge, don't you? A. Yes, sir.

Q. You know the place where the dredge went through, from Chittenden's bridge over into Hyde Lake? A. Yes, sir.

Q. Is it the water that has run out of that cut that has made the change? A. The water run out and in quick enough; it is pretty quick.

Q. The water can't stay in there since the cut was made? A. No, not so much any more. Sometimes it go up and go out quick again.

Cross-Examination by MR. GREGORY.

Q. Do you know where Mr. Smale lives? A. Yes, sir; I have been there a couple of times.

Q. Did the water used to run into Hyde Lake across the Indian Ridge Road in high water, north of your house? A. From the river?

Q. Yes, sir. A. Yes, sir; many times.

Q. It does not do that now? A. No, not at all now.

Q. What prevents it now? A. That is low water. I guess the lake is lower and the river is deeper, or something like that. The river is deeper.

Deposition of JABEZ G. SMALE, *taken April 23, 1889, on behalf of Conrad N. Jordan, before J. W. Dyrenforth, a Notary Public in and for Cook County, Illinois.*

MR. DENT: I will read the cross-examination in the deposition of Jabez G. Smale.

MR. GOUDY: If it is read now he must read it as his deposition, not as cross-examination.

THE COURT: You make it your evidence, the same as if it was a deposition taken by yourself?

MR. DENT: Yes, but we only read the cross-examination.

THE COURT: Very well. They may read any other portion of it.

Counsel for Mr. Hardin thereupon read from the deposition of Jabez G. Smale, as follows:

Cross-Examination by MR. GREGORY for petitioner, Charles B. Shedd.

Q. What house did you live in in 1881, when Mrs. Condit asked you to take charge of her house? A. Right across the water from there; southeast from there.

Q. What house? A. In my house.

Q. In the State of Indiana? A. In Illinois. In the Town of Hyde Park, County of Cook, State of Illinois.

Q. Do you know what section that would be? A. Southeast fractional quarter section 20.

Q. When did you build that house? A. I built that house in November, 1875.

Q. Now, did you continue to actually reside in that house from that time up to the spring of 1881? A. Till the spring of 1882.

Q. And actually resided there, in this house, in the southeast fractional quarter of section 20, which you had built in 1875? A. Yes, sir.

Q. That was your actual place of residence? A. Yes, sir.

Q. And during that time you had no other actual place of residence? A. No, sir.

Q. How long have you known John I. Bennett? A. Since 1879.

Cross-Examination by MR. SWETT.

Q. You are farming down there, Mr. Smale? A. Trying to raise garden vegetables.

Q. Where is the land that you are farming? A. Along on the ridge north and south of the house.

Q. Both north and south of the house? A. My garden is south of the house, and I do most of my gardening south of the house.

Q. How far south of the house does this Condit tract run— A. (interrupting) Just a quarter of a mile south.

Q. (continuing) does your farming extend? A. I have only a garden south of the house. The biggest part of my farming is north of the house.

Q. You have leased the whole of this Condit tract, haven't you? A. You mean the Jordan tract?

Q. Yes. It belongs to Jordan now, I understand, but is called the "Condit tract," the piece that Mrs. Condit used to claim? A. Yes, sir.

Q. But you did not farm this quarter of a mile south of the house, except garden tract? A. Yes.

Q. Why don't you utilize this? A. It is all hay land.

Q. You could not raise vegetables on it? A. Yes; could now it is plowed up. It is dry enough.

Q. Do you, during ordinary seasons, use it for agricultural purposes? A. It is slough across.

Q. Water comes up there sometimes, don't it? A. Not the last two years—the last two years there has been no water there.

Q. How was it before two years ago? A. Wet and swampy.

Q. Over there? A. Not on this quarter you speak of.

Q. There was water there? A. Certainly, there is always water in low lands after a storm.

Q. Does the water extend generally over that region there? A. No, sir.

Q. How is it on this, south of the house—is it wet and soggy there? A. Yes; it is wet.

Q. Is there water on the ground?

MR. BENNETT: All questions and answers in this line are objected to as not cross-examination, and counsel are notified that this will be regarded as examination in chief for the other side.

Q. Will you answer that question, please? A. As I said before, it gets wet sometimes, but nothing to do any material hurt.

Q. The railroad track runs west of your house, does it not? A. Yes, sir.

Q. How far? A. Two hundred and eighty feet by surveyor's measurement.

Q. Two hundred and eighty feet? A. Yes, sir.

Q. That runs northeast along the border of Hyde Lake? A. Yes, sir.

Q. How far is your house from Wolf Lake? A. Somewhere, I should judge, in the neighborhood of seventy-five or one hundred feet.

Q. You have a boat running by your house, don't you? A. Yes, sir.

Q. Are there any trees around your house? A. Yes, sir.

Q. How wide is this space upon which the trees grow? A. I have never measured it, but I can tell within a few feet. It has different widths.

Q. Well, what is about the average width? A. I should judge the average width was the width by the house where we live.

Q. By the house? A. I should judge it was in the neighborhood of—I do not think it can be more than one hundred and twenty-

five or one hundred and fifty feet by the house; of course it runs in different widths.

Q. These trees extend south of the house?

MR. BENNETT: The questions are objected to, and counsel states that the direct examination was confined to the identification of leases, and no question was asked as to physical structure of the ground; and the question is objected to as not cross-examination, and counsel move to call it as examination in chief, and that the defendants take the witness as their own.

THE WITNESS: North and south both.

Q. As you go down south from the house in these trees, do they grow wider or narrower? A. Wider and more dense.

Q. As you go south? A. Yes, sir.

Q. How long do they continue to grow wider; for how great a distance south? A. It is pretty hard to determine.

Q. A quarter of a mile? A. Probably a couple of blocks.

Q. Then do they get narrower after that? A There are no trees at all after that.

Q. It is slough land, you mean? A. Hay land.

Q. Is this slough you have spoken of south of the trees—does the water at ordinary stages stand there or run across? A. I never seen the water run across.

Q. You have seen the water stand there? A. Sometimes; after a heavy rain I have seen water there, but of course it cannot be plowed in level places.

Q. In this place here, where the water stands, it sometimes, when the water is standing there that way, how wide is it between the open water of the two lakes? A. There is no water laying there.

Q. There is a lake to the east, isn't there? A. There is a lake to the east and a lake to the west, but there is no water there.

Q. In the winter time how wide a space between open water? A. How wide is the land space between open water?

Q. Where you cut the grass in high water, how wide a space? A. That I cannot say, because I haven't measured it. It is pretty hard to get at it.

Q. You seem to have a pretty good idea as to distance. How far is it—I am asking in high water? (No answer.)

Q. Why do you hesitate in answering this question? A. Because you want me to judge of distances, and of course a man when he hasn't a map, and no figures, he has to calculate.

Q. I want you to give me the best impression you have with reference to this land or this low place, in time of high water? (No answer.)

Q. Is it one hundred feet wide? A. Wider than that.

Q. One hundred and fifty?

MR. BENNETT: Give your best judgment as to the distance? A. Somewhere in the neighborhood of two hundred or two hundred and twenty-five feet.

Q. Then, Mr. Smale, the ridge upon which your house stands and upon which trees grow, terminates at this low slough place about two blocks south of your house, doesn't it? A. There is small willows and brush that grows up close, but no very large trees that continue up to the fence, the section line fence, the southeast and west line.

Q. You mean the southeast and west line of section 20? A. Yes, of section 20.

Q. This slough extends from a couple of blocks of your house, pretty well to the Field house, does it not? A. I believe it does, with the exception of a small ridge between.

Q. I understood you to say a while ago that there was a fire of the grass that extended from the Field house north to your house? A. Yes, and a half a mile north of my house.

Q. How about the character of this soil south of the house and east and west line of section 20 south to the Field house? A. It is rather unequal; some is higher and some is lower.

Q. Some lower than the piece you have described a moment ago? A. Yes. sir.

Q. Then, in that portion the water used frequently to overflow, I suppose? A. Not now; now, since the canals have been built it drains the water off the land so it cannot lay.

Q. At high water how wide would the space of land or slough be between this east and west section line of section 20 and the Field house; how wide a strip of land would there be between this line and the Field house at high water? (No answer.)

Q. Is it one hundred feet wide? A. You have reference from the south line east and west line of 20 down—down to the north line of the Field place; it is about the same as it is there; but further on there is a ridge that runs along Wolf Lake shore; that is quite a high piece.

Q. What grows on that ridge? A. Nothing but a little brush and grass.

Q. At high water, does the water cover any of this portion you have just described? A. A small portion of it.

Q. At high water? A. When we have high water, of course it rises a little, but not so as to cover the ground, though.

Q. I understand you again that there is a strip of low swamp land between the south line of section 20 and the Field house. Now, I want you to tell me how wide this strip is in periods of high water? A. Well, from the north line of the Field place up to the Field place there is a ridge of, I should judge, of from fifty to seventy-five feet wide.

Q. How is it north of that? A. It is north of the Field house —west of Wolf Lake shore.

Q. How is it north of Field's line to section 20? I am asking you with reference to the condition of the land north of the north line of Field's place? A. That is what I am speaking of; from the east and west south line of 20 to the east and west of the north

line of the Field place, the land was pretty low. I am speaking of the line north of the Field place.

Q. That is about fifty to seventy-five feet wide? A. Yes, sir.

Q. How wide is it between the south line of 20 and the north line of the Field place; is it nearer than it is from the north line of the Field place to the Field house? A. It is nearer from the north line of the Field place to the Field house than it is from the north line of the Field house to the south line of section 20.

* * * * *

MR. SWETT: Q. This soil, then, Mr. Smale, that you testified to a while ago, extends on beyond the Field house, does it not, south of the Field house? A. Just a short piece up to the canal.

Q. Is it about the same character between the Field house and the canal, or is it lower? A. Lower.

Q. And is the ridge about the same north as it is south, or does it get narrower? A. I believe when it gets up to the house it is wider and more of it.

Q. What is the condition of the land just south of the canal and to the Reese place? A. That is higher and drier land—better land.

Q. About how wide is the space in here at high water? A. I believe I never seen any water lying on that except in one place. One corner is a little low; the rest is dry.

Q. The water extends clear across in that place? A. No.

Q. How wide is this strip of land in high water between the canal and the Reese place? A. The biggest portion of it runs between the north and the south center line—west of Wolf Lake—and the Wolf Lake shore. I could not tell you the distance any further than I know that line there is principally all dry any time of year.

Q. You say from there you do not know the distance across it? A. I never measured it. It is principally all dry between the north and south section line to the Wolf Lake shore, where the new shanty is built up there.

Q. Where do you keep your boats? A. Right in front of my house.

Q. On the east side of the house? A. Yes, sir.

Q. You sometimes go over in your boats into Hyde Lake? A. Sometimes they come down through the channel into Hyde Lake. The channel south of the club house—that is, the Field place—there is a club house on the Field place.

Q. Do you mean to swear, Mr. Smale, that in high water, such as they had in 1882, or at any time of excessive high water, that a boat could not cross from Wolf Lake to Hyde Lake at any point between your house and Reese's Point? A. From my house and Reese's Point, at any place—do you mean at any place?

Q. I say, is there any place in there that a boat could cross from at high water? A. Yes; there are places where a man might shove a boat, but he could not get in it to row.

Q. There are places that it could be done? A. Yes, sir.

Q. That is pretty well filled with grass, isn't it? A. They could not cross into Hyde Lake.

Q. Previous to two years ago they could do it—could push a boat across there in various places? Answer the question. A. Well, I never seen a boat taken across there.

Q. And never tried to take one across and never saw one taken across? A. No, sir; never seen one taken across, and never tried myself to take one across.

Q. It could be done, though? (No answer.)

MR. BENNETT: The question is objected to as calling for a theoretical answer that is not based on fact.

Q. You have frequently gone from your house down to the Field house, I suppose? A. Yes, sir.

Q. You are familiar with that ground? A. Somewhat familiar with it.

Q. Is there a bridge or culvert between these two houses? A. Yes, sir; there was one on the road that was built at the time we built a brush road through there.

Q. How deep is the water in Wolf Lake? A. That I could not say—various depths.

Q. In deep water, how deep is it? A. In the channel of the river, I suppose, it is somewheres about seven or eight feet now—at the present time.

Q. How is it in other parts of the lake? A. In some places it is not more than five or six inches deep, a foot deep, or a foot and a half, or two or three feet deep, just as you strike it; it is shallow all over.

Q. How does the water in Wolf Lake compare with Hyde Lake? A. There is a great deal less water in Hyde Lake.

Q. In low water in Hyde Lake, how deep should you think the water was? A. I could not tell. I have not been in Hyde Lake with a boat for some two or three years, myself, so I could not judge.

Q. You remember when you were in there, don't you? A. I don't remember anything about it.

Q. You lived northeast of Hyde Lake and know something about it? A. I could if I should measure it. There is a canal between.

Q. Were you ever in Hyde Lake at times of low water? A. Not as low as the water is at the present time.

Q. When you were in there, how deep was the water then? A. I do not know, for I never measured it. Probably it was from six to eight inches to two or three feet. You might find a spot four feet, but I don't think it would run any deeper than that at any place in Hyde Lake—those places fill so you cannot tell.

Q. What did you say you raised on the land down there? A. All the different kinds of vegetables.

Q. Name them? A. Turnips, potatoes, carrots, muskmelons, squashes, corn, tomatoes and tobacco.

Q. How large an extent of land do you cultivate—how many acres do you cultivate there? A. Well, I will have to make a guess. We cultivate, I guess, three or four acres. It was all broke up.

Q. Why don't you cultivate the rest of the land there? A. I don't need to cultivate it.

Q. It is too low, isn't it? A. I don't require so much produce as I could raise. I don't raise produce for the market.

Q. You cultivate about three or four acres? A. That is what I cultivate.

* * * * *

Adjourned to Tuesday, November 24th, 1891, 10 o'clock A. M.

10 A. M., Tuesday, November 24th, 1891.

Court met pursuant to adjournment at the above hour.

G. B. CRAIG, a witness called in behalf of defendant Gertrude H. Hardin, being first duly sworn, was examined in chief by MR. DENT, and testified as follows:

Q. What is your name and occupation? A. G. B. Craig; surveyor.

Q. Where or with what company are you employed, Mr. Craig? A. The Fort Wayne.

Q. Were you concerned in the survey of the line of the Chicago and Southern Railroad through Hyde Lake? A. Yes, sir.

Q. How were you concerned in that survey? A. I was assistant to the engineer in charge there, Mr. Scoville.

Q. When did you make a survey or make that survey? A. It was early in the summer of 1886.

Q. Did you take the elevation of the bed of the lake and ascertain the height of the water, with reference to the city datum, in making that survey? A. Yes, sir.

Q. Where did you commence the survey, with reference to section 20, for instance, or section 30 or 31, township 37 north, range 15 east? A. We started our line—the South Chicago and Southern was a branch of the main line—leaving at Colehour, or 103rd street.

THE COURT: Q. Started at Colehon ? A. Yes, sir, and ran south and connected there with the Pan Handle. * * * We started on the north line of section 20. I don't remember the distances from the section corners, exactly what it was.

MR. DENT: Q. Tell, if you please, how you progressed; how you made the survey, and whether you found water? A. Yes, sir; we struck—

Q. And how you got across the water? A. We found water before we came to section 20. We had a boat—procured from Mr. Smale; he has a boat-house there on the ridge. We got a boat from him, and made our survey from day to day, using that boat,

and rubber boots when they were sufficient, and when we got over them we didn't have anything on. There was one case, down about the south line of section 20, that we had to drive stakes and turn the boat upside down.

THE COURT: Q. Had to do what? A. We had to drive stakes and turn the boat upside down and put the top of the boat up and got on top of that for our transit.

THE COURT: For what? A. The instrument we run our line with.

Q Where was that at? A. That was at about the south line of 20.

MR. DENT: Q. State whether you had been wading in the water, or whether you had to wade in the water? A. Yes, sir; we had hip boots, and they were continually in use.

Q. Why at that point did you have to turn the boat up? A. The water was too deep there. We could not set the instrument up in the water.

Q. How did you drive a stake there, if you drove any or had occasion to drive any? A. We took off our clothes and drove them down there. We could stand in it. There was about three and a half feet of water there.

Q. What was the state of the ground as you went along where you struck ground at any point, or did you strike ground? A. Yes, sir. Well, at the north line of 20 it was sandy bottom and about, I would say, 1,300 feet south of the north line of 20, there was a slough in there about 400 feet across on our line. Then we struck sandy bottom again. There was another slough then about opposite Mr. Smale's house there, where you see the water coming up (indicating). It was very deep in there—that is about four feet of water, with three or four feet of mud. Then we had very good bottom from that on down until we got at about Elm Island there and struck another—a sort of floating—

THE COURT: Q. Until where? A. Elm Island, about the center line of 29, we struck a floating sod there. That was about 300 feet, and then from there south we had very good sand bottom.

MR. DENT: Q. This is the center line of section 20 here? (indicating). A. Yes, sir.

THE COURT: Q. You say at Elm Island you struck another floating place? A. Yes, sir; a floating bog it was.

Q. How large? A. About 300 feet on our lines.

MR. DENT: Coming down to the bridge, a little southwest of Elm Island, did you strike any land going south? A. Yes, sir; from there south we had very good bottom.

THE COURT: What is that, the cut?

MR. DENT: Yes, sir; the cut marked "Bridge."

Q. Is that the cut across there (indicating)? A. Yes, sir; that is the channel.

THE COURT: Q. After you got south you had very good bottom? A. Yes, sir; excepting down at about the south line there of 29

right there (indicating). There was a small lake in there, a sort of a puddle, which was also muddy; there was a foot and a half of mud in there on the bottom, along about 200 or 250 feet across on our line.

MR. DENT: Q. How deep was the water along that line from the cut south? A. It would average about a foot and a half, except in that little lake there. There was about three feet in there.

THE COURT: Q. Averaged a foot and a half from there? A. From the cut south.

MR. DENT: Q. North of Elm Island and up to the island marked McDaid's—part of the ridge—near the south line of section 20, how deep was the water between those points? A. The average depth was about three feet.

Q. How was the water east of the line of the railroad, or the line adopted for the railroad, between those two points that I last named? A. The water was about the same average.

MR. BENNET: Q. Three feet, do you mean? A. Three feet.

THE COURT: Q. Three feet or two feet? A. Three feet.

MR. DENT: Q. Please look at the exhibit I now show you, marked "Exhibit 1, Craig," and state what it is and explain it, if you please. A. That is a profile of the South Chicago and Southern Railroad from the south line of section 30, township 37 north, range 15 east, to the center line of 20.

Q. What did it represent as to the railroad? A. That was the original ground there before our railroad was built; as we found it when we first went over it.

Q. Does the map show the alignment of the railroad? A. Yes, sir.

Q What elevations with reference to city datum did you find? A. Some sand—

Q. Are they represented on that profile? A. Yes, sir; both sand and water.

Q. Are those elevations represented on that profile? A. Yes, sir.

Q. How are the elevations illustrated as to the colors? A. The sand line is shown with black line tinted with brown, and the water lines are blue.

Q. What was the height of the water line above datum? A. The average in the summer of 1886 was about 2.8 feet above datum.

Q. Does that map show higher elevations? A. Yes, sir; it shows higher water down there in that country since I have been here, that was 4.3 feet above datum. That was in the spring of 1887, February 15th.

Q. What other stages of water—heights, reckoned from city datum—did you find? A. An elevation in May, 1886, we found was 3.68 feet.

THE COURT: Q. Where? A. That was on our line down there.

Q. You mean the average? A. No, that was that day, one day in May. It was May, 1886; I have it.

Q. 3.68 feet at what point? A. That was all over.

Q. You mean the average on that day was that? A. Yes, sir.

Q. The average height? A. Yes, sir.

Q. On the day it was taken? A. Yes, sir.

MR. DENT: Q. That was the elevation of the water—that is, the surface of the water above city datum, was it? A. Yes, sir; in May. I did not put down the date. I have another one here in February. At this date, February 28, 1887, it was 3.3 feet above city datum.

MR. BENNETT: Q. February, 1887? A. 3.3, February 28, 1887.

MR. DENT: Q. How have you represented those elevations on this profile, or how are they represented? A. There is a heavy blue line drawn.

Q. Explain to the Court? A. There is a blue line with the water level marked right above it (indicating).

Q. The water is represented by the blue color? A. Yes, sir.

Q. At a certain elevation, and then there are shorter lines above, aren't they, which show higher elevations? A. Different stages; yes, sir.

Q. And figures giving those elevations? A. Yes, sir.

Q. Those higher lines are not extended through the profile? A. No, sir.

Q. But they are short? A. Yes, sir.

Q. What is the meaning of the figures along the line of the road on east side?

THE COURT: The line of the railroad?

MR. DENT: Yes, sir.

A. The red one is the elevation of the sand or the bed of the lake above city datum. The figures in black indicate the depth of the water at the point they are located on the map.

Q. The figures on the right I see here are the black figures. They indicate the depth of the water, as I understand it? A. Yes, sir; at that point.

Q. And the figures on the left, being the red figures, show the depth, or show the elevation of the bottom, rather? A. Yes, sir; the elevation of the sand.

Q. These are all in feet and hundredths of feet, are they? A. Yes, sir; or feet and tenths, as the case may be there (indicating).

Q. The survey was made at what time? If you notice this, you will see (indicating) whether that represents it? A. It was early in June, 1886, different dates we were down there.

Q. I observe you have on the profile there marked "May, 1886," about near the center, if you please; what does that mean?

A. That was the first day we were down there. We came here—I came here May 25th. and we started right in on that work.

Q. It was in the latter part of May then? A. Yes, sir.

Q. Have you noticed the map "Exhibit C" introduced by Mr. Bennett and which is now before you? A. Yes, sir; I have seen it here before.

Q. That is designated as map of sections 19 and 20, 29 and 30, township 37, 15, showing topography in contour lines.

THE COURT: That is Jordan's Exhibit C, isn't it?

MR. BENNETT: Yes, sir.

Q. Jordan's Exhibit C. Noticing the note that is given there, where it says, "The topography in contour lines for each foot in elevation," what would be the meaning of that among surveyors? A. Well, I would take it from that, that from this point to that one (indicating) there would be no ground above one foot above datum; between those two points, and from there to there (indicating), no ground between them above datum and two feet above datum.

Q. Then you come to the white portion; what would be the meaning of that? A. That would be between two and three. That is the way I would take that to be.

Q. You are designating the different colors between Wolf Lake and the railroad, as I understand, looking from the east towards the west, and you find from that map, if you followed it, two different elevations, wouldn't you, before you reached the white portion or the high land? A. Yes, sir.

Q. Each supposed to be one foot in elevation? A. Yes, sir.

Q. Or not exceeding one foot in elevation? A. Yes, sir.

THE COURT: Q. The darker one foot and the next lighter two feet above datum? A. Yes, sir.

MR. DENT: Q. And the next lighter would be— A. Three.

Q. Between two and three?

THE COURT: Between two and three.

MR. DOUTHART: Q. And the next lighter would be between three and four? A. Yes, sir.

MR. DENT: Q. How would it be between Hyde Lake and the railroad from the west towards the east? A. Well, there is different elevations there; some places there where it would be only two foot—from there to here (indicating), only two feet above datum.

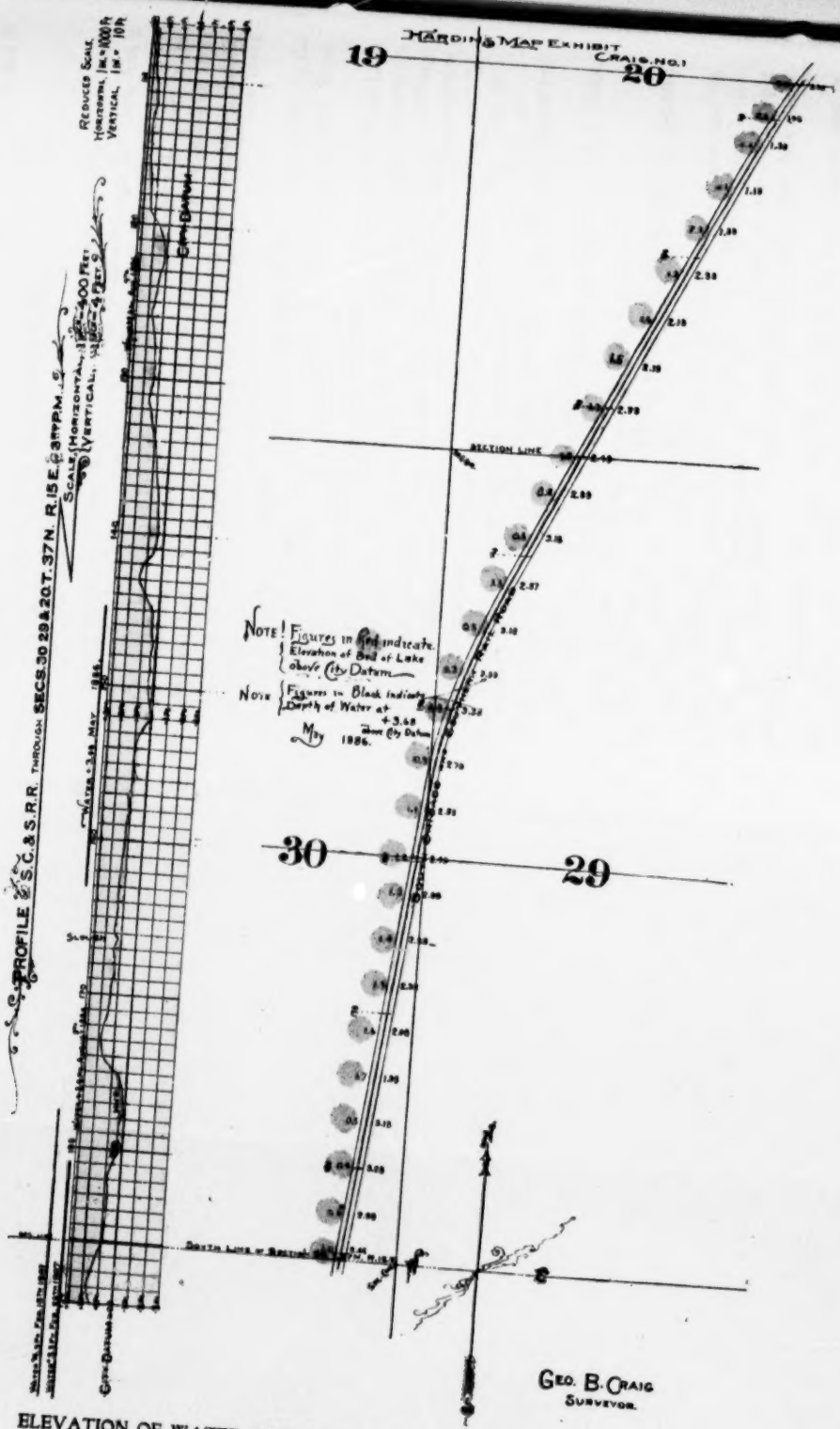
Q. Would that be two feet or would it be only there next to the white— A. From here to there (indicating), one foot above datum, and over here (indicating), two feet.

THE COURT: Q. One foot the dark, and the two feet next to the right—two feet? A. Yes, sir.

MR. DENT: Q. You can state whether or not the water at one foot above datum would cover all this portion next to Hyde Lake?

MR. BENNETT: I object. That does not need an expert.

MR. DOUTHART: The map speaks for itself.


HARDIN'S MAP EXHIBIT
CRAIG NO. 1
19
20
30
29
SECTION LINE
PROFILE OF S.C.&S.R.R. THROUGH SECS. 30 29 & 20 T. 37 N. R. 15 E. 3RD P.M.
SCALE (HORIZONTAL 1 IN. = 300 FEET
VERTICAL 1 IN. = 4 FEET)
REDUCED SCALE
HORIZONTAL 1 IN. = 1000 FT.
VERTICAL 1 IN. = 10 FT.
NOTE! FIGURES IN RED INDICATE ELEVATION OF BED OF LAKE ABOVE CITY DATUM
NOTE FIGURES IN BLACK INDICATE DEPTH OF WATER AT MAY 1886.
+3.68 ABOVE CITY DATUM
GEO. B. CRAIG
SURVEYOR.

ELEVATION OF WATER ABOVE CITY DATUM:

May —, 1886,	3.68
August 9, 1886,	2.80
February 15, 1887,	4.30
February 28, 1887,	3.30

(See Craig's Testimony, Rec. 264.)

Q. According to the map?

THE COURT: Let him answer.

A. I would say according to the map that the water one foot above datum, on coming up from this line to this, it would cover this (indicating).

Q. Pretty close to the railroad? That is next to the white portion, immediately next to the railroad? A. Yes, sir.

Q. You can state, if you please, whether, looking farther south, south of where the name Rushmore is put on the map, south also of McDaid's, you see a strip of dark outline there—what would be expected to cover that, according to the map—what height of water? A. That is in here (indicating).

Q. Yes, sir. No, there (indicating), across between the two lakes, from Hyde Lake over to Wolf Lake, immediately east of the Rushmore? A. Oh, two feet there would cover that (indicating). Take three feet to cover that in there (indicating), and one portion there four feet.

Q. Look at the point immediately northeast of where the name Rushmore is, from that point southwest? A. One foot should cover that.

Q. Southwest across the railroad—how far would one foot carry the water? A. Carry it over to the track, over to the railroad.

Q. How much elevation of water would carry it over to Wolf Lake? A. Two feet.

Q. Taking that line (indicating)? A. Two feet.

Q. Do you know the Field house? A. Yes, sir; sitting down there at the slip, by the slip.

Q. On Elm Island? A. Yes, sir.

Q. Were you at that house sometimes while you were making the survey? A. Yes, sir; stopped there.

Q. You may state if you noticed whether that house was occupied or unoccupied or vacant while you were making that survey? A. It was not occupied when we first was in that country. It was occupied later on, and then I believe it was vacant again.

THE COURT: Q. That was in 1886? A. Yes, sir.

THE COURT: Which house was there—the Field house?

MR. DENT: The Field house.

Whereupon Mr. Dent offered in evidence the map identified by this witness.

(Map is herein inserted, marked Hardin's Exhibit "Craig, No. 1.")

Q. Did you notice how near the water of the lake came to Smale's, both on the east and on the west? A. Well, on the east side it was about 75 feet from his house.

THE COURT: Which side?

MR. DENT: East side.

Q. And on the west side?

THE COURT: Which does he mean? You said "east."

MR. DENT: After he answered I asked him how it was on the west side.

A. On the west side it was about 60 feet.

Q. South of the Smale point * * * or between that point and a sort of a crescent-shaped piece of ground, how was the water? A. Well, there was quite a little bit of land.

Q. How was the water there where that is?

* * * * *

A. There was a space between Mr. Smale's house and that other island that was covered with water. Yet they had some brush and small trees cut down there so they could get across.

* * * * *

Q. Smale's house, south of the center line of section 20, a point extending down some distance southwest, and then an intervening space before you come to the crescent-shaped land? A. Yes, sir.

Q. How was the water between those two points? A. Well, there was—would be two feet of water there, but they had a sort of brush road laid in between that island so that they could get across—some small trees and brush cut down and laid in there.

THE COURT: Q. Was that brush road so they could get up north and south? A. Yes, sir.

Cross-Examination by MR. BENNETT.

Q. Did I understand your name is Craig or Crane? A. Craig.

Q. What position—what office—did you perform in running this road—what did you do? A. I was assistant to the engineer, and rod man.

Q. Were you rod man while this survey was being run? A. Yes, sir.

Q. You didn't have anything to do with the instrument? A. Yes, sir; now and then I would run the instrument, and the engineer, he would go out ahead.

Q. But generally you were rod man? A. Yes, sir.

Q. Before going at the work did you examine the maps so as to see the sections and topography? A. Yes, sir.

Q. I understand you to say that before you reached the north line of section 20 you struck water so that you had to wear rubbers? A. Yes, sir; we did.

Q. That is correct, is it? A. Yes, sir.

Q. How deep water did you find north of the north line of section 20? A. North of the north line of section 20 there were sloughs above there, that we struck some very deep water.

Q. They were a long ways above, weren't they? A. Just about—around a thousand feet back there, and then around the north line of 20 we began to strike water again, and that was continuous on down.

Q. That was the highest water you found through there, was

not it, at the time of your survey? A. No, sir. Later on, February; I think it was 1887.

Q. I mean during your work on the road there? A. Yes, sir; that was the highest then.

Q. Was the cut made from the west side of Hyde Lake to Chittenden's bridge at the time you commenced to make this survey? A. No, sir.

Q. Did you make that entire survey before that cut was made? A. Yes, sir.

THE COURT: What cut do you mean?

MR. BENNETT: From the west side of Hyde Lake to Chittenden's bridge?

THE COURT: Oh, yes.

MR. BENNETT: He says this cut was not made.

MR. COURT: The cut to Chittenden's bridge?

MR. BENNETT: The cut to Chittenden's bridge; he says that cut was not made until after this survey was made.

Q. Is that right? A. That is right; yes, sir.

Q. So that at that time the water was dammed up or held in by Indian Ridge, to some extent, wasn't it? A. Yes, sir.

Q. What was the earliest day you went down there to make this survey? A. It was between May 25th and June 1st.

Q. Do you remember whether it had been rainy or whether the snow had melted or ice melted prior to that time? A. No, there hadn't been any rain of any recent date.

Q. The lowest water represented on this profile, or the bottom of the lowest water or bed of the land or water represented on this profile, is city datum, isn't it, or do I read it right? A. It may be a little below datum there. It is there in city datum. Yes, the lowest is city datum.

Q. There was no water then that you struck on the line of this survey, the bottom of which was lower than city datum? A. No, sir.

Q. And that only occurred in two points—one of the points the bottom of the mud represented was down at city datum?

THE COURT: What?

MR. BENNETT: The bottom of the mud went down to city datum, but not the water itself.

THE COURT: The bottom of the mud at what point?

Q. Now, Mr. Craig, you did not strike deep water until you reached the half section line or about the half section line east and west of section 20, did you? A. No, sir.

Q. And you found solid bottom up here (indicating), and then the deep water was only for a short distance? A. Yes, sir; there was just a sort of a slough in there.

Q. The bottom was sand, wasn't it? A. No; it was muddy.

Q. Certain it was not sand bottom there? A. There was a slough in there, originally, there, which was very muddy.

Q. Wasn't that slough above that—wasn't the soft mud above

that? A. No, sir. Well, it was right about where your pencil is there (referring to where Mr. Bennett was indicating on the map.)

Q. Above the half section line? (No answer).

Q. And this was sandy bottom, wasn't it? (indicating.) A. Yes, sir.

Q. You struck high ground here, say seven or eight rods south of the half section line, didn't you? A. Well, how high?

Q. I am asking you? A. Well, it was all covered with water. We did not strike any there out of the water.

Q. You didn't? A. No, sir.

Q. Didn't you go over a line here fifteen rods south of the half section line which was three or four feet above datum? A. No, sir; not on our line.

Q. What is represented here by this colored portion (referring to "Jordan's Map C") on this white?

THE COURT: The dark lines?

Q. That is a ridge? A. That is a ridge there.

Q Does that represent trees too? A. Brush—small oaks—scrub oaks on there.

Q. Didn't you see trees two feet through in diameter right on that ridge? A. I know there was at the north end high trees.

Q. No; where I am pointing now? (indicating). A. No, sir.

Q. Do you swear that there were no trees there at that time a foot and a half through in diameter? A. A foot and a half?

Q. Yes, sir. A. I do—two feet.

Q. Weren't they one foot and a half thick. A. Right there (indicating).

Q. Did you ever see any basswood that was three feet in diameter there, standing or down? A. Not where you have your pencil; no, sir.

Q. I mean on that ridge? A. No, sir.

Q. You found hard ground out there, didn't you? (indicating). A. Yes, sir.

Q. Right along—even on the south of Smale's house? A. Yes, sir.

Q. And then you found a little soft ground there where it is represented on the map? (indicating). A. Yes, sir.

Q. You say here was a slough in which the water was setting back at that time? A. Yes, sir.

Q. When you passed that to, say, thirty rods north of the south line of section 20, you came to high ground again, didn't you—hard ground—sandy bottom? A. We struck sandy bottom there; yes, sir.

Q. And up here, there was quite a high ridge? (indicating). A. There was a ridge there.

Q. With trees growing all along? A. Some trees in that ridge.

Q. You found the ground hard all the way down to the south line of the northwest quarter of section 29? A. 29?

Q. Trees growing the whole distance? A. Yes, sir; some large trees there.

Q. At the extreme south end there were quite a number of quite large trees? A. Yes, sir.

Q. So this dark line running from the north of Smale's house south to some 30 rods north of the south line of 20 and surrounded on either side with a lighter color represents a belt of trees running around there? (indicating). A. Yes, sir.

Q. Some quite large trees? A. Some large trees on that ridge.

Q. This space between here, between those two points on the map (indicating), you say was some lower? A. Yes, sir.

Q. You say some brush was cut and a road made over which they drove right onto this ridge and continued south? A. Yes, sir.

Q. How far south now from the point below the word "McDaid" on this map did you go before you struck soft ground again? A. I should say 1,200 feet.

Q. Over 1,200 feet? A. Nearly.

Q. Then there was a sort of a bay setting in from Hyde Lake? A. Yes, sir.

Q. How was it there? A. Very muddy in there.

Q. Considerable depth through here? (indicating).

THE COURT: Three hundred feet wide?

Q. Three hundred feet wide? What representation is made of that on the profile? Is that the point that comes down to city datum? A. Yes, sir; that is the point that comes down to city datum.

Q. The bottom of the mud at that point was at city datum? A. No, the mud isn't there.

Q. Is that water? A. That is water—that is open lake.

Q. The other point is farther south? A. Yes, sir.

Q. About 300 feet across that? A. Yes, sir.

Q. And then you struck hard ground again, did you? A. Yes, sir.

Q. Which continued down to within twenty feet or so of the cut that was subsequently put through there and the bridge? A. Yes, sir.

Q. Hard ground? A. To nearly there.

Q. How was the channel cut through, then? Describe the channel. A. Sort of a ditch the hunters had used in going through with their boats.

Q. Is that the point you have represented as city datum? A. No, sir; that is not down to datum.

Q. That is not down? There was hard ground on either side there, wasn't there? A. No, sir; a floating bog—

Q. How long did that continue? A. That was 250 feet; somewheres around that.

Q. Then you struck hard ground again?

THE COURT: Q. What cut, between the two lakes? A. Yes, sir; down there.

MR. BENNETT: Q. Why isn't that on the profile? A. What is that?

Q. The cut or ditch. A. This is the ground as we found it before any cut had been made.

Q. After you passed the ditch you found that you soon struck hard ground again? A. Yes, sir.

Q. And at the left was an elevated ridge? A. Yes, sir.

Q. With poplar trees and other trees? A. I don't remember. There were trees there; I don't remember what they are.

Q. And the ground continued hard then pretty much down to what is shown here as the south end of the lake? A. There was a little pond in there like, that is indicated upon the map here, upon this map here (indicating).

Q. None of it was below datum, though? A. No.

Q. How is it shown on the map—locate that point? A. That point is there down to datum; about a foot and a half of mud there.

Q. About a foot and a half of mud? A. Yes, sir.

Q. That was all? A. Yes, sir.

Q. Sand bottom under? A. Sand below that.

Q. That was about the muckiest place you struck until you got to the south end of the lake, wasn't it? A. Yes, sir.

MR. DOUTHART: Q. You say this was down to datum; do you mean the top of the mud or the bottom of it? A. The bottom of it.

Q. The sand under the mud was down to datum? A. Yes, sir.

Q. How deep was the mud? A. About a foot and a half.

MR. BENNETT: Q. What time in the year was it you made this early— A. Early in the summer of 1886.

Q. What month? A. The latter part of May and June—early June—early in June.

Q. Did you walk the whole distance of the lakes when you made that survey? A. Walked and rowed a boat. We had our boat, and there was a tree here, and we would bring our boats up and would chain in there (indicating).

Q. You brought the boat along so you could go to points in the lake? A. Yes, sir.

Q. Off the line, too, in part, wasn't it? A. Well, it was a rapid means of getting around there.

Q. You spoke about the water in the vicinity of Smale's; do I understand you to say it was seventy-five feet from Smale's house east to the water? A. Yes, sir.

Q. That water in the ditch which Smale had dug was for the purpose of getting boats into his house? A. Yes, sir.

Q. And the end of the ditch would be out farther than that,

wouldn't it? A. Well, it was more—the ditch was more, more than anything else, to get boats out easy.

Q. Had planks out seventy-five or eighty feet farther? A. Yes, sir. He had little row of stakes there.

Q. It would be 150 feet or something like that from the house to the end of his pier? A. Yes, sir.

Q. On the other side of the house you say the water was within sixty feet, on the west side? A. Yes, sir.

Q. This water that had flooded up in this ravine here? (indicating). A. Through there; yes, sir.

Q. That was submerged in high water, but would pass away as soon as the high water passed, wouldn't it? A. Yes, sir; it has gone now.

Q. Were you down there when this slip was cut through from Chittenden's bridge from the west side of Hyde Lake? A. Yes, sir.

Q. Did you see what effect that had on the water in those lakes? A. Well, it has had its effect to-day, I think.

Q. I don't mean now, but immediately after it was cut? A. No, I did not notice any immediately after.

Q. Were you there immediately afterwards? A. Yes, sir; I was with them every day.

Q. Have you been down and examined the property lately? A. Yes, sir; been on the ground pretty near once a week.

Q. You have been in communication with Mr. Shedd in reference to the facts of this case for some time, haven't you? A. I only know the gentleman by sight, that is all. I have never spoken to him.

Q. Have you with Mr. Hardin? A. Mr. Hardin subpœnaed me; yes, sir.

Q. Didn't he consult with you some time ago in reference to the facts here now? A. He merely told me he wanted me to give him some water levels there, is all, and heights.

Q. And how long ago is that? A. Well, three weeks ago, perhaps a month.

Q. Did he speak to you during the progress of this survey on the subject? A. No, sir.

Q. Did you see him then? A. No, sir; I did not know Mr. Hardin.

Q. You spoke about a floating sod at some point; is that the point (indicating), south of the south line of the northwest quarter of 20, where you say there was a sort of bay? A. This was down near Mr. Cleveland's there; down near the north line of 31 there.

Q. That was on 31? A. No, it was on the South Chicago and Southern, on the line of 30, I think it is. It is not marked there. It is right in there (indicating).

Q. You spoke of being down there in 1887; what were you doing there then? A. We were building the Calumet River line on the west side of the lake there.

Q. Was your attention entirely or pretty much entirely confined to the west side of the lake, to the line of the Calumet River railroad at that time? Did you make any special investigation at this time? A. We had worked over there on both lines.

Q. At that time in 1887, I mean? A. Yes, sir.

Q. When was the South Chicago and Southern completed as to its grading—when was the grading completed of the South Chicago and Southern? A. About August, I think.

Q. Of what year? A. 1886.

Q. So you weren't over here for any such purpose? A. No, sir.

Q. When was the Calumet River railroad built? A. It was completed, I think, in the summer of 1888, early in the summer of 1888.

Q. When was that commenced? A. Well, we made our survey there in the winter of 1886 and 1887 on the ice.

* * * * *

Q. You never saw "Jordan's Exhibit C" before to-day, did you? A. Yes, sir; I was in the court room here one day last week—I don't remember the date—I stepped in to look at the maps.

Q. You had nothing to do with making that map? A. No, sir.

Q. Do I understand that all you said about elevations and water here, in connection with the language, "topography in contour lines," was your definition of what those words meant? A. Yes, sir.

Q. How much have you worked at map making yourself? A. Off and on for the last five years.

Q. Did you ever make a map yourself entirely? A. Yes, sir.

Q. What is your position now with the railroad? A. Assistant to the engineer over here.

Q. The same position you had in 1886? A. Yes, sir.

Cross-Examination by MR. DOUTHART.

* * * * *

Q. Take this map here (Jordan's Exhibit C)—take a line there half way between the middle of section 30 and the south line of section 30. * * * What sort of land was it? A. East of our track—a high ridge there.

Q. On the west how was it? A. Sandy bottom, but covered with water.

Q. Grass on it? A. Yes, sir.

Q. What kind of grass? A. Swamp grass.

Q. So you could walk over it? A. With rubber boots; yes, sir.

Q. How much water was there in the grass? A. Oh, in the neighborhood of two feet.

Q. During the summertime how was the land there, later on in the year? A. It is high and dry now.

Q. No, no, at that time? A. Well, after, in the summer, later on in the summer, it all came out high. There was no water

on it later on that season, say August or September, somewheres around there, I think.

Q. The character of grass which grew there was such grass which hardly grows in land that was always submerged, was it not? In other words, you found none of that grass over in the middle of Hyde Lake or Wolf Lake? A. No, sir; no, we did not find any of that in the water over in the lakes. There is plenty of it up north.

Q. In the lake, in the middle of the lake? A. No.

Q. That is always submerged? A. At the north end of Hyde Lake, it was submerged there from the time we got there until late in the summer.

Q. Do you remember what kind of grass grew over there on the Cleveland tract? (indicating). A. Yes, sir; I remember the swamp grass. They sell it for hay, I think.

Q Were you there when they dug that canal or threw up the track for the road? A. Yes, sir.

Q. How was that land at that time—that is, I mean the Cleveland tract, as marked on Exhibit C?

MR. DENT: Do you mean before the canal was dug, or afterwards?

MR. DOUTHART: No, at the time this road was graded.

Q. I believe that is the canal along the side of the road? (indicating). A. Yes, sir.

Q. At the time that was being graded down there, how was the land of the Cleveland tract? (indicating). A. It was covered with water.

Q. What time of year was that? A. That was July—the latter part of June or July.

Q. Were you there at that time? A. Yes, sir.

Q. Was that Cleveland tract covered with water at that time? A. Yes, sir.

Q. And when was that dry? A. Later in the summer; the water began to fall then, and it has been going down continuously until it has got down below datum now.

Q. As a matter of fact, was not the canal cut through to the Calumet River before you graded down by the Cleveland tract? A. Yes, sir.

Q. When the canal was cut through did the water fall? A. Very little.

Q. Very little? A. Very little. It would rise and fall with the wind. The water runs both ways.

THE COURT: The water from the Calumet River—that was cut before—

MR. DOUTHART: Before the grading down at the Cleveland tract?

Q. You say when the canal was cut through from the Calumet River to Hyde Lake that the water did not fall much? A. It would rise and fall with the wind.

Q. Was there any difference generally in the height of the

water than before the canal was cut? A. Certainly; the water was gradually coming down—evaporation taking place.

Q. Did the cutting of the canal make any difference? A. I think not.

Q. None at all? A. No, sir. The water ran into the lake from the river.

Q. You have been down there lately, have you? A. Yes, sir.

Q. How is it now? A. The water was below datum the last time I was down there.

Q. Never mind about datum; how is the land? A. High and dry.

Q. All high and dry? A. Yes, sir.

Q. How long has it been high and dry? A. About two years.

Q. How many times have you been down there in the last six years? A. Oh, we were down there every day—down there three times a week.

Q. That was when you were at work there that summer? A. Up to last season; why, we were down there once a week, anyhow.

Q. Over on this tract? A. On that Calumet River line.

Q. Upon the termination of the construction here, say during these last six years? A. Once a week.

Q. What doing? A. Going to work beyond somewheres.

Q. Went over the road? A. Yes, sir.

Q. Did not get off? A. No, sir.

Q. Have you seen people cutting grass down there? A. Oh, yes.

Q. Have you seen them running machines down there? A. I have not seen any mowing machines.

Q. Seen any turnips, corn or wheat growing down there? A. No.

Q. You would have seen them if they had been there, wouldn't you? A. Yes, sir.

Q. You have been all over there? A. There is a little patch here on the ridge.

Q. Take the Cleveland tract? A. Is that the Cleveland tract east of the South Chicago and Southern? I saw some houses down there.

Q. Have you seen anything growing in there? A. Over here (indicating).

Q. The Cleveland tract is supposed to be bounded by that line there? (indicating). A. Not on the Cleveland tract.

Q. You saw nothing growing on the Cleveland tract—did you see them cutting hay there with a machine? A. Not on the Cleveland tract.

Q. Did you ever see anything growing on the Cleveland tract except grass? A. There used to be an old house down there.

Q. I didn't ask you about a house; did you see anything growing there? A. If that was Mr. Cleveland's, I have been near it,

and I think they had a little garden spot. I know I saw this on that tract around there, by that red line (indicating).

Q. When did you first see the garden spot there? A. I think that there was somebody living there when we first struck that spot.

Q. Water all around his house, was there? A. No, not on the east side, next to the ridge, east of him there.

Q. His house was not on the ridge? A. Only a spur of it; yes, sir.

Q. What? A. That old house.

Q. Where was his barn? A. I think on the ridge. We used to go in there to get out of the rain.

Q. Any water around the barn? A. I think on the northwest side the water was pretty close.

Q. That is over towards the ridge? A. Towards our track, northwest, off this way (indicating).

Q. Was there any water around the barn—immediately? A. No, sir.

Q. The barn was up high and dry, then—the water wasn't there? A. I don't think it was that spring, 1887.

Q. Did you see it in 1887 and pay attention to it at that time? A. I did not notice it particularly; no, sir.

Q. Do you ever remember seeing it when the water was around it? A. No, sir.

Q. You have seen it a good many times, though—you went in there to get out of the wet? A. Yes, sir.

Q. How about his house, did you ever see the water around his house? A. I don't know that I have.

Q. You have been there a good many times, haven't you? A. I have been there; yes, sir.

Q. Stopped at the barn, and near the house? You never remember seeing any water around about his house? A. I think not immediately around the house; that is, very close.

Q. How far from his house to the south was the water? A. To the south?

Q. I mean to the west of his house? A. Say fifty feet.

Q. How far to the north of his house or to the east of his house was the water? A. There was a ridge between his house, I think, and Wolf Lake.

Q. How long across was that ridge? A. 1,200 feet.

Q. How far across is the land between Wolf Lake and Hyde Lake, where the cut goes through from Wolf Lake to Hyde Lake? A. About 1,000 feet.

Q. There is land about 1,000 feet wide between the two lakes there? A. Yes, sir.

MR. DENT: That is now, as I understand it?

MR. DOUTHART: Let me alone, Mr. Dent.

THE COURT: Q. Do you mean now? A. Yes, sir; now.

MR. DOUTHART: Q. Has the character of this land materially changed since you first saw it? A. Yes, sir,

Q. How much? A. It is all high and dry now.

Q. How much has the water gone down—have you measured it? A. From the highest to the lowest point that we have got there?

Q. No, from the time you first saw it until the present time do you know the difference in the height of the water? A. Four feet. Well, to the present time, it is about datum, say, 3.6 feet.

Q. You say that has gone down simply by evaporation?

THE COURT: Q. Gone down 3.6 feet? A. Yes, sir.

MR. DOUTHART: Q. From the highest point to the present? A. When I first struck it, it was higher than that.

Q. Was that a very high year? A. Very. The old settlers said it was the highest they had seen it.

Q. What time was that in the year? A. It was in the spring.

Q. There had been a great many rains and snows down there? A. Yes, sir.

Q. Didn't you go there in the spring before the ice was away? A. Yes, sir.

Q. You worked, as I understand you, on the ice? A. Surveyed the Calumet River line that winter on the ice.

THE COURT: Q. What? A. We made the survey of the Calumet River line on the ice.

Q. When? A. The winter of 1886.

MR. DOUTHART: Q. When did you finish that—was it in the spring or winter? A. Well, we were working on it there when that high water came in February, 1887.

Q. You were working on it in February, 1887? A. Yes, sir.

Q. And then the high water came on it? A. Yes, sir.

Q. It cam e from the rains and melting of the snow, did it? A. I think it did.

Q. It staid at that as long as it rained? A. No, it was after the rains and snows. It was not raining when we had our highest water.

Q. It had been raining before that? A. Yes, sir.

Q. And the water came down there, as I understand it? A. It was a spring thaw.

Q. Didn't it rain a good deal during the forepart of the summer? A. I don't remember.

THE COURT: Q. That was 1887, was it? A. Yes, sir.

Cross-Examination by MR. GREGORY.

Q. I understood from this profile here, Mr. Craig, that you took the water on the 15th of February, 1887, somewhere down in the Wolf Lake region, at 4.3 feet above datum. Where did you find the water standing at that elevation? A. At the slip there which is represented on there (indicating).

Q. At what slip?

THE COURT: Q. The cut between the lakes? A. Yes, sir;

the cut between the lakes. The water in those lakes is on a level with Lake Michigan.

Q. That was after the South Chicago and Southern Railroad had been built down between the two lakes, wasn't it? A. The South Chicago and Southern was in operation then.

Q. Was the railroad on the west line of Hyde Lake in operation? A. No, sir; it was not built yet.

Q. Do you know how long the water stood at that elevation? A. Oh, a couple of days was all.

Q. Do you know what it was due to? A. To the spring thaw we attributed it to.

Q. Were you then at work on the railroad? A. On the west side, on the Calumet River road.

Q. How much land was there left between the two lakes when the water stood in the slip there at 4.3 feet above datum? A. There was not very much. Now and then you could see a little of the ridge peeking out; is all at the north there (indicating).

* * * * *

Q. Did that piece of land then appear to be an island? A. I don't think it did. I think the water was around the house then.

Q. You think the water was nearer the houses at that time, so that the two houses were surrounded by water, were they? A. Yes, sir.

THE COURT: What two houses?

MR. GREGORY: The Field house and this house (indicating).

THE COURT: The club house?

MR. GREGORY: The club house; yes, sir.

Q. This map shows a break in the ridge at comparatively a short distance south of Smale's house. I believe you say that there was such a break at that time? A. Yes, sir.

Q. Did that continue when the water fell to 3.3 feet above? A. Yes, sir; the break was still there.

Q. How much land was there on each side of the railroad all the way down, principally on the east side? A. Do you mean then?

Q. No, at the time this high water was taken in February, 1887? A. There wasn't very much then. Those ridges were partly covered.

Q. Was there land all along the railroad all the way down to the slip? A. No, it was not in sight; just the tops of these ridges; the ridges were partly covered.

Q. That was a ridge running all the way down the line of the railroad between the two lakes? A. No, sir.

Q. There were breaks in the ridge where the water ran through? A. Yes, sir; there were breaks.

Q. Have you been taking levels at the instance of Mr. Hardin in this matter? A. No, sir.

Q. You simply gave him levels you had taken in the course of your employment? A. Yes, sir.

Q. And you personally had nothing to do with the drafting of any of these maps that are exhibited before you? A. No, sir.

MR. BENNETT: Q. I understand you now to fix—

MR. DENT: I would like to ask the witness on re-examination, but you can go on though if this is cross-examination.

THE COURT: Yes, sir; go on.

Further Cross-Examination by MR. BENNETT.

Q. I understand you, now, that this period of very high water that you speak of was February, 1887? A. Yes, sir.

Q. When you were at work on the Calumet River railroad? A. Yes, sir.

Q. How long were you at work on that road at that time? A. We started on the Calumet River survey late in the fall of 1886—early in the winter of 1886, between 1886 and 1887.

Q. How long in February, 1887, did you work on it? A. Well, we worked until the high water came and then we had to cease operations. We had it pretty well staked out before February, 1887; that is, where the water was liable to affect us, we had our stakes already in, ready for the dredge to come in.

Q. How did you go back and forward to your work? A. We had a hand car that we used on the South Chicago and Southern.

Q. You went over the track of the South Chicago and Southern Railroad on a hand car? A. Yes, sir.

Q. You were employed nearly all the time over there on the Calumet River railroad side, weren't you? A. Yes, sir.

Q. Did you, at any time in February, 1887, see this locality or property except as you saw it going back and forth on a hand car? A. Why, I think we had some notes to take—a few measurements made for the South Chicago and Southern.

Q. Where, if you remember, in that month? A. Well, I can't give any location.

Q. You can't remember any location you took any measurement in, in the month of February, 1887? A. I remember getting off at the slip there (indicating). We got the dredge in through here (indicating). We had a water gauge there (indicating).

Q. Yes, I know, but have you any other recollection of getting off? A. No, that was all.

Q. During that month? A. That was all there.

Q. You have nothing but a recollection of the appearance acquired by simply going back and forth to your work in that way on the other road? A. No, we had work for the line there that would call us to different points along the line.

Q. Can you tell of any one thing you did?

THE COURT: He said he had a boat and waded some, didn't you? A. Yes, sir. No, I cannot give any special work that was laid out.

MR. BENNETT: Q. You had no object in determining the height of the water there or in what condition the ground was, had you, at that time?

THE COURT: That was February, 1887?

Q. February, 1887? A. Yes, sir; we wanted to be sure to get our Calumet River line above high water mark.

Q. But would you do it by an examination of the water? A. That water is all level in there.

Q. I understand that a look at your gauge would be in that line, but you don't remember anything you did in that respect, I suppose? A. No, sir.

Q. In February, 1887? A. No, only that we were called here and there.

THE COURT: Water usually seeks its level.

Re-direct Examination by MR. DENT.

Q. When was the cut between the two lakes made or enlarged or deepened, if you know, with reference to the cut between Hyde Lake and the Calumet River? Which was made first? Which of those cuts? A. The dredge started in from the Calumet River there and worked its way into the lake; and the first one came across the lake and worked north on our South Chicago and Southern line.

Q. Was the cut made between the Calumet River and Hyde Lake at that time, or was it made at a later time? A. Between Hyde Lake and Wolf Lake?

Q. Yes, sir. A. It was made later.

Q. I meant to ask by my question whether the cut west of the lake, between Hyde Lake and the Calumet River, was completely made at first or whether it was made after you located the railroad; can you tell when it was made? A. The dredge started there June 28, 1886, and worked its way in.

Q. Was it dredged as the dredge went right in? A. Yes, sir.

Q. To about its present condition? A. Yes, sir; just as it is to-day. Our only object was to get the dredge in the lake so as to get over to our line.

Q. When was the cut between the two lakes made—can you give the date of that? A. (Referring to memorandum.) I don't know whether I have got that. It was later on in July, I think.

MR. DOUTHART: Q. Same year? A. Yes, sir; July, 1886.

MR. DENT: Q. How deep are those cuts, respectively? A. Why, about six and a half foot of water.

Q. And how wide are they? A. Thirty-five to forty feet.

Q. How deep is the cut along the west side of the Chicago and Southern Railroad? A. About the same depth.

Q. How wide is that? A. Same width; thirty-five to forty feet.

Q. Is there a cut next to the Calumet River Railroad also? (indicating). A. Yes, sir.

Q. Where is that cut? A. Well, it is just along the east side of the track. It runs north from where it is shown on the map Exhibit C.

Q. The map Exhibit C does not show the full length of that

cut? A. No, sir; it runs up to Mr. Smith's house, about there (indicating).

Q. Mr. Smith's house is just south— A. It runs up to about this section line here (indicating).

THE COURT: How is that described?

MR. DENT: The south line of section 19.

Q. This map Exhibit C does not correctly exhibit that cut, as I understand, because it does not extend it far enough north? A. No, sir.

Q. How large is that cut? A. Well, it is deeper than the other, about eight feet in depth; the same width, thirty-five to forty feet.

Q. Which side of the railroad is that one? A. East side of the track.

Q. When was that made? A. That was made in the spring and summer of 1887.

Q. I understood you to say that you did not notice at first a difference in the waters when a cut was made; which cut did you refer to, which cut or slip? A. From the Calumet River into Hyde Lake.

Q. When a cut had been made next to the Calumet River Railroad, and also between the two lakes, did you notice a difference in the waters? A. No, sir; only that the water was gradually going down; it kept on doing so as the water lowered in the lake.

Q. What was it affected or caused the various elevations in the water? A. Why, that is Lake Michigan lowering; low water in Lake Michigan.

Q. Did you notice the effect of the winds upon the lakes? A. Yes, sir.

Q. In what respect did the winds have an effect? A. When you got a wind from the north the water rises in these Hyde and Wolf lakes, and when the wind was from the south the water lowered.

Q. You made one survey on the ice, I understood you to say? A. Yes, sir.

Q. Why was that made on the ice? A. Well, it was out in Hyde Lake, there (indicating).

Q. State whether or not it was easier to make a survey on the ice than when the ice was away? A. Yes, sir; it is. We can get our soundings more accurately and do our work more rapidly, too.

Q. You spoke of it being something like half a mile, when you were asked by Mr. Douthart, between the extreme southern point of Hyde Lake and Wolf Lake, as I understood you? A. Yes, sir.

* * * * *

THE COURT: Q. What time are you testifying about? A. Now.

THE COURT: We all supposed it was 1886.

MR. BENNETT: Oh, that is as to its condition now. I don't care to continue it any further, if that is so. A. Now.

GEORGE W. WAITE, a witness called in behalf of defendant Gertrude H. Hardin, being first duly sworn, was examined in chief by Mr. Dent, and testified as follows:

Q. State your full name? A. George W. Waite.

Q. What is your business, Mr. Waite, or occupation? A. It has formerly been, most of it, engineering.

Q. Where? A. How far back shall I go?

Q. State generally what engineering work you have been engaged in.

THE COURT: Don't go back of fifty years.

A. I commenced in Chicago in 1848 on the old Galena and Chicago Railroad, in March of 1848.

Q. You have had connection with engineering to a considerable extent since that time, I suppose? A. Yes, sir.

Q. Are you acquainted with Wolf Lake and Hyde Lake? A. Tolerably well.

Q. Had you at any time connection with the Engineering Department of Hyde Park? A. Yes, sir.

Q. When was that? A. I was Village Engineer and Superintendent of Public Works from about 1861 to 1869.

Q. When did you first know of Wolf Lake—what was your first acquaintance as to the time? A. I think it was in the spring of 1867.

Q. Had you been there before to Wolf Lake at any time? A. I passed by the mouth of Wolf Lake in 1839. I went near the mouth of Wolf Lake in the summer of 1840 on horseback.

Q. How did you find Wolf Lake in 1839 or 1840 as to its connection with Lake Michigan? A. It was closed up—the mouth was.

Q. How was it closed up? A. By a sand bar.

Q. Did you observe that in 1839 and also in 1840? A. I did.

Q. Have you known of that bar being open or opened at any time? A. Yes, sir; several times.

Q. What was the occasion of it being open—how was it opened? A. Well, when the water was high in Wolf Lake and Hyde Lake and George Lake it would break through into Lake Michigan and make quite a channel.

Q. You can state whether or not there was connection between the three lakes you have named? A. Yes, sir.

Q. What was the connection between Lake George and Wolf Lake? A. There was a channel between Wolf Lake and Lake George.

Q. Do you know whether it was a natural channel or artificial? A. It was a natural channel in high water, but not a natural channel in low water. There was a channel cut through there. Mr. Forsyth cut one through there, and then it became a channel in low water.

THE COURT: Q. A channel between where? A. Between

Wolf Lake and George Lake. I have been through there in a boat.

MR. DENT: Q. How large is the connection between Wolf Lake and Lake Michigan which is sometimes called Wolf River—it is known sometimes as Wolf River, is it not? A. Yes, sir; it is known all the while I believe as Wolf River.

Q. How large is it? A. Wolf River is about a mile long. When it would break through into Lake Michigan it would make a channel through from thirty to fifty feet wide, and I have seen it ten feet deep.

* * * * *

Q. Have you observed as to the waters of Wolf Lake and Hyde Lake with reference to the waters of Lake Michigan, or to Lake Michigan, what connection there is as to elevations? A. Well, I have seen it, I think, fully five feet above Lake Michigan, and I have seen it when I thought it was not but very little above Lake Michigan, probably six inches.

Q. What was the cause of those changes or differences? A. Well, the winds in Lake Michigan piled up the water at the mouth of Wolf River or made a dam, and then that caused the water in the lakes to rise until it was high enough to break over that sand bar, and then it was drawn down.

Q. In early times, when you first knew of these lakes, how much of the time would that outlet across the bar from Wolf Lake to Lake Michigan be open? A. Probably from a quarter to a third of the time.

Q. What was the occasion of your observing those waters in 1839? A. I was on a steamboat, and the steamboat sprang aleak, and the captain said he would try and see if he could get into the mouth of Wolf River, and he said if that was open he would try to run in there. We came very near sinking. Then he tried the mouth of the Calumet River, tried to get in there, and he could not. There was a bar there also; and it was the last trip the boat ever made, when she got into Chicago.

Q. You did not get into the mouth of the Wolf River nor into the mouth of the Calumet River? A. No, we could not get into either.

Q. That was on acccount of the bar? A. That was on account of the bar; yes, sir.

Q. Have you noticed as to Lake Michigan about its periods of high and low water, or whether there are such periods? A. I have noticed from reading the report of the Commissioner of Public Works. I have noticed those tables that those reports have given from year to year.

Q. But as to your observation and measurements? A. Well, I know it is sometimes very high and sometimes very low. It has periods of being high and periods of being low.

Q. Have you observed how these periods run, whether by years, or how it is? A. I can't say definitely, but I should judge from

five to six or seven years and perhaps longer, it will continue to go up and then it will commence to recede.

Q. Which are the longer periods, the high or low water—which is the longer? A. I think high water is the longest.

Q. How high does the water in Lake Michigan go above city datum—how high have you known it to go? A. I think it has been over five feet.

Q. What is low water in Lake Michigan—what would be an estimate of low water? A. Well, low water is about a foot above datum.

Q. A foot above datum? A. A foot above datum. It is very seldom that it goes below datum, but I am told now it is a little below datum, but it is very seldom it gets as low as that.

Q. Would you regard it as low water if it were at datum? A. I should; very low, indeed.

Q. There are times, however, aren't there, when it is below datum? A. I believe there are. I am told it is below datum to-day.

Q. Extreme low water would be below? A. Below datum; yes, sir.

* * * * *

Q. Did you ever observe whether there was a bank along Hyde Lake on the west side? A. There was an old ridge there, called Indian Ridge. In some places the lake approached pretty close to that ridge, and in some places there would be quite a strip between it, between the lake and the ridge.

Q. State whether there was a ridge that was defined or a border to the lake rising above the lake? A. Do you mean Indian Ridge?

Q. No, I am speaking now of a border of Hyde Lake? A. Well, there was a well-defined bank to Hyde Lake. For instance, you could walk along there on the lake shore and then step down into the water.

Q. Where was the road with reference to that defined bank? A. It was west of it.

Q. How far west? A. Well, in some places it would be, maybe, perhaps 200 or 300 feet; in some places more than that.

Q. How long have you known that road? When did you first know of it? A. It was about 1867.

Q. You may state whether the water of the lake is sometimes quite near the road, or how it was? A. Oh, in the high time I have seen the water clear up to the foot of the ridge, or Indian Ridge.

Q. How near to the road? A. Well, the ridge is very narrow. The ridge in some places ain't over twenty feet wide; the road occupied nearly the whole of the ridge.

Mr. Gregory: Q. The road is on the ridge, is it? A. The road is on the ridge; yes, sir.

Mr. Dent: Q. State whether the water at any time was over

the road or submerged a part of it? A. There were sags in the ridge, and through the sags I have seen the water flowing from the lake into the river and from the river into the lake, backwards and forwards.

Q. How far north? You spoke of the cut being near the center of section 30? A. Well, the place where the water ran across was all through that part (indicating).

Q. In section 19? A. Yes, sir; up in there in some places; I should say about where your pencil shows.

Q. About half way between the center line of section 19 and the south line of section 19? A. Pretty near, I should say. I built a causeway across there so that the road could go across there.

Q. How large a strip or body of water would there be between the lake and the river at that point? (indicating). A. I have seen the water running across there 200 feet or 400 feet.

Q. In what direction did it run? A. Very near east and west.

Q. Which way did the water run? A. If Calumet River was very high, it would run east. *Vice versa*, it would run west. If the lake was very high it would run west.

Q. Have you noticed the land that is represented upon this map, ("Exhibit C, Cole, Alvord & Shields, 1886 to 1890,") between the two lakes? (indicating). A. Yes, sir.

Q. When did you notice that first? A. I drove down to the foot of that spur, I think, in the fore part of 1867, with a horse and buggy.

THE COURT: Q. What date? A. I think it was, well, probably in June; May or June of 1867, according to my best recollection. It was immediately after the annexation; after we had annexed the southern country there, and I think it was in the winter of 1866 and 1867, according to my best recollection.

MR. DENT: Q. You drove down near to the Condit house? A. No; I went clear down below as far as the road went. I wanted to go down through there—down to Reese's place.

Q. You drove to the Smale point? A. Yes, sir.

THE COURT: Q. Did you ride or drive? A. There was no road at all.

Q. Did you ride or drive? A. I drove in a buggy; I drove as far as I could drive on account of the soft ground.

MR. DENT: Q. How far was that? A. It was to that place between that crescent island and the Smale ridge.

THE COURT: Q. Between what? A. Between what I call the crescent island and the ridge north of that.

MR. DENT: Q. What is the crescent island? A. That map over there represents it. I drove down from the foot of the spur here, drove down as far as that (indicating), and could not get across there from that point to this (indicating). This is what I call the crescent island (indicating). * * *

The Smale house was up there (indicating), and this is the lower end of that ridge (indicating), and then another ridge across here (indicating), then here is a place down here (indicating . Then this island (Elm Island). Afterwards I drove clear down through there repeatedly with a horse and buggy. I was a little afraid that time to try it.

MR. GREGORY: If counsel would now ask two or three questions he can make the testimony of the witness intelligible; for instance, if I may be permitted—

MR. GREGORY: Q. You say you drove down * * * south to Smale's house? A. I did.

Q. Thereupon you could not get across between there and what you call crescent island? A. That is it.

Q. The point that runs into the lake below Smale's house from the southwest quarter of section 20 is separated from the land of which I am speaking now, the ridge, for a considerable distance, isn't it? A. Yes, sir.

Q. Is that higher than the other island I spoke of before—a crescent-shaped island? A. I think it is, sir.

Q. How wide is the higher part of that point—Smale's Point—of the ridge? A. Above the spurs, where the two spurs come together, I should guess it was 300 feet or 250 feet wide. That is north of where the spurs come together.

Q. As represented on that map before you there is a division? There are two ridges? A. Yes, sir.

Q. One of them extending further south than the other, and the other extending down only about half way or half as far.

THE COURT: Q. How wide did you say it was where the spurs come together? A. From there north, well, 200 feet, from 200 feet upwards. I can't tell you exactly. Say from 200 to 250 feet, according to the best of my recollection.

MR. DENT: Q. How wide is the divide between the two lakes, when you have noticed that divide, the marsh divide? I am not speaking now of the high land or islands, but the divide itself, the land between the two lakes? A. Well, my recollection will be 500 or 600 feet wide—the marsh divide between Hyde Lake and Wolf Lake.

Q. In what stage of water? Would it be a high water stage or low water stage? A. Oh, high water stage I have seen the water run all over it—the marsh divide.

Q. That would be in a low water stage, wouldn't it? A. Not extreme low water stage, but say when the water was probably two feet above datum—two feet and a half above datum—in that neighborhood.

Q. Of what is that divide composed? A. It is composed of muck and grass and sand. There is a sand bottom, and then there is a muck on the sand, and then grass grows over the muck. That is the general composition of it.

Q. What is the growth on it, if any? A. Pretty heavy. Sort of wire grass grows over it.

Q. How deep is the muck, if you had occasion to notice? A. Yes, sir; I have probed it every 100 feet from crescent island down there between Smale's Point and the crescent island, every 100 feet. As a general thing there would be about a foot to a foot and a half of muck until you get down below crescent island and north of Field's house. There is a place across there—

THE COURT: Q. You say you have probed it from what point? A. I have probed it all the way from this point (indicating) to here (indicating).

MR. DENT: Q. South part of Smale's Point? A. And from here clear down to this ridge, and right here (indicating) was pretty near—about across here, right north of Elm Island, was very deep muck, as deep again as it was in any other place—the place there 325 or 330 feet wide.

Q. Please state whether you have seen Elm Island submerged, or how nearly you have seen it submerged, if at all? A. I never saw it submerged, but I have seen the water pretty near to the steps of the house.

Q. How would the water then be from the Indian Ridge on the west to the east shore in Indiana? Would there be much separation of water? A. State that question again.

Q. From Indian Ridge? A. When the water would be at the stage I speak of it would be about four feet above datum. It would then extend pretty near up to the foot of Indian Ridge.

Q. And how far would it extend from the Indian Ridge east? A. Well, when you get over on the other side of the ridge it would extend from there to Calumet River.

THE COURT: Q. That is west? He said east. A. Oh, east.

MR. DENT: Q. Yes, east? A. Well, all that point between crescent island and Smale's Ridge would be covered, and there would be one or two places in the ridge—two, I think, at least—where the water would break across the ridge—probably fifteen or twenty feet wide where the water would break across the ridge.

Q. It would be one sheet of water, then, all the way across, wouldn't it? A. It would be one sheet of water over the marsh divide.

Q. Wolf Lake and Hyde Lake would be connected together? A. Would be connected together, yes, sir, at that stage.

* * * * *

Q. Did you inspect that ridge or divide at any time with reference to locating a road? A. Yes, sir; that was the reason I took the sounding through there—was to locate a road between the lakes.

Q. When was that, or about when? A. I think that was the fall of 1867, when I tried to locate the road for the trustees of Hyde Park.

Q. When was that with reference to the time when you tried to drive there? A. That was after that.

Q. That was some time after that? A. Yes, sir.

Q. Did you inspect the ground also at any time in 1885 before the trial of the ejectment suit of Hardin against Jordan before Judge Gresham? A. Yes, sir; I went over this ground then.

Q. At what season of the year? A. I think it was in April, 1885.

Q. How did you get over it then? What way did you take of getting over it? A. Well, we drove up to Field's house—where the boat house is.

Q. You drove up there from Reese's? A. From the south.

Q. From Reese's? A. From the south, from Reese's, and there left our team and got a boat and went out into the lake—the edge of the lake, and then from there we waded through the water to crescent island, and then we walked all the way the rest of the way.

Q. From Reese's Point or house through to Elm Island, what was the character of the ground and water? A. From Reese's house it was dry, timbered, sand ridge, until you got to the end there (indicating on map), and then it was marshy ground from there north.

Q. Up to the higher land—that is, above the cut? A. Yes, sir.

Q. How near the road between those points did the water come on each side, or about how near? A. Some places right up to the road. I think there were places we drove through the water where there had been some brush thrown in and one thing and another. I think that was along from there.

Q How was that road formed, do you remember? A. Well, there were ditches cut on one side. I am not certain whether there was a ditch cut on both sides or not. And dirt thrown up, and where the places were the worst they had put in brush and then hay and then dirt on that.

Q. Did you go over what is marked there as "Elm Island" in any way and see the extent of it? A. Yes, sir; I did. I walked the whole length of it.

A. And its breadth, did you observe that? A. And I noticed the breadth, but I cannot remember exactly the measurement now. I am giving you the best of my recollection.

Q. Was there any considerable breadth of land that was much elevated above the water? A. No.

Q. What is your recollection of that? A. There was a narrow ridge through the center, and then it spread out each way until it tapered down to the marsh ground.

THE COURT: Q. That is Elm Island? A. Yes, sir; it is not abrupt—the edges of it.

MR. DENT: Q. What was the stage of water then, whether average or otherwise? A. It must have been about three feet above datum, I think.

Q. You had seen the lakes before, from 1867 up to that time? A. Yes, sir.

Q. I wish to know whether the water was above the average then, or below the average? A. I think it was rather above, if anything. I think the water must have been—well, over three feet above datum; perhaps three and a half feet above datum. I know that the marsh ground was covered with water.

THE COURT: Q. Is this the spring of 1885 you are talking about? A. Yes, sir. The marsh ground was covered with water. I could see water in the grass all the way.

MR. DENT: Q. About what, in your judgment, would be the average height of water, from what you have observed? A. You mean as compared with datum, or as a lake?

Q. Datum? A. Well, I would give it about two and a half feet.

Q. What has caused the changes in the channels, the lower parts, if you know, or have judgment upon that subject, between the two lakes? A. Well, the channel that is there, I have always understood, and believed it to be a fact, was cut by the boatmen to get their boats from one lake into the other.

THE COURT: Q. Which channel is that? A. The old channel between Hyde and Wolf lakes.

MR. DENT: Q. That was south of the Field house, wasn't it? A. Yes, sir; south of the Field house.

Q. I wished your judgment as to the changes, if you have observed any, in that marsh divide or in the divide between the two lakes, especially in the lower parts? A. North of where this is—I think just north of where this old channel is, there used to be in former days evidently a channel across there, and that has got filled up with muck and grass that has floated in there, driven by the winds from the lake, I think—the reeds and one thing and another driven in there, and it is very soft. I think I ran a pole down there in one place between four and a half and five feet.

Q. You may state whether the depth of the muck seems to have been increasing? A. It was deep there in places, I found. Some places it would be a foot and a half, and some places nearly two feet, but there it was quite deep and very soft.

Q. State whether the muck seems to have been increasing in depth, from your observation, in that divide? A. Where the grass don't burn, or where the grass lays and rots, each year it is increasing the height of the ground all the while gradually. At the west end of this old divide was what appeared to be a floating island. It did not seem to have any foothold at all. It all seemed to be loose. I have been to the end of it and examined it. It seemed to be loose, without being connected below at all, as if it was floating.

Q. Where was that channel? A. That channel was north—as near as I can recollect now, that channel was through here somewheres (indicating).

Q. North of Elm Island, then? A. North of Elm Island. That is the best of my recollection.

THE COURT: Q. That would be about 300 feet north of Elm Island? A. I would think from 200 to 300 feet.

MR. DENT: Q. State whether there was any channel or communication between the lakes north of crescent island and south of the Smale Point? A. There were places, sags in the ridge, where you could see the water had run across by the drift—would get old grass in there, and one thing and another, where it had lodged, to show that the water had some day run across there.

Q. Can you state whether, in fact, a few inches either higher or lower in the water would make a great difference in that divide between the two lakes? A. Oh, it would make it narrower. If the water was three inches higher it would make it narrower.

Q. Would there be much left of it if the water were three inches higher than the ordinary stage? A. Yes, there would be some left. If the water was six inches higher than ordinary, it would nearly all be covered except Elm Island and the crescent island and Smale's Ridge.

THE COURT: Q. Six inches higher than ordinary? A. Than ordinary.

MR. DENT: Q. How is it as to the water in the lake or lakes now as compared with earlier times when you first knew of these lakes? A. Oh, I don't see a great deal of difference so far as Lake Michigan is concerned. Those inland lakes seem to be growing dryer.

Q. I am speaking specially of Wolf Lake and Hyde Lake? A. Well, they seem to be growing dryer.

Q. That is the tendency, is it? A. I think it is.

Q. How does that happen, if you know? A. Well, evaporation and cultivating the ground around there, and cutting ditches and one thing and another—letting the sun in to take up the water.

Q. How is it as to the land adjacent north and south and east and west, as to marshiness? A. North, the land has grown dryer every year since I have known it, up around Colehour. Between there and clear up north to the monument. It has been continually growing dryer.

Q. When did the Government open the Calumet, or commence opening the mouth of the Calumet? A. 1868 or 1869. I won't be positive.

Q. How was the Calumet before the Government commenced any work there, as to whether it was open at the mouth? A. Well, it would be open about one-third of the year, I should say, and two-thirds closed, and when it was closed, it turned and went south fifty rods to where the harbor is now, I should say, before it broke out into Lake Michigan. It turned and went south, and there was a bar. That bar grew less and less until it finally petered out, and then the water broke out into Lake Michigan. The north end of the bar was the highest.

Q. Would that bar be opened sometimes by the water? A. Oh, yes. As I said, I should judge the water would break through

there—it would break through in the spring and break through in the fall, and sometimes, if we had a very heavy rain, it would break through in the summer.

Q. What would be the effect upon the lakes after the bar was open and the water would break through? A. It would draw them and draw down the river, too.

Q. Would there be any turning of the waters this way from Lake Michigan, towards Hyde Lake or Calumet? A. Oh, there might be; if there was any heavy east storm for a short time the waters would run into the lake.

Q. What effect would that have upon the bar? A. Well, when the river was open for a little while the bar would commence forming on the north side of it, and it would continue to form, and the water slop over—work over—all the while, and fill up the lakes until the bar got formed, and when the water had piled up in the lakes about so high, then it would carry the bar away and the lakes would recede again. That was about the operation.

Q. Are you speaking now of the bar of the Calumet? A. Both of them. Operated in just the same manner at the mouth of the Calumet River as at the mouth of Wolf River.

Q. Well, that applies largely to both? A. Yes, sir. They both were governed by about the same law.

Q. Suppose the water in the Calumet were held back by the bar being formed at the mouth. What effect did that have upon the water in Hyde Lake and Wolf Lake? A. It would raise it through this circuitous connection.

Q. Now, about what period of the year, or how much of each year, would the lakes—Hyde Lake and Wolf Lake—be raised in that way—the waters of the Calumet setting back? A. Well, I should say nearly two-thirds of the year. I think the outlet used to—before there was any improvements down there, I think the outlet used to be kept open about one-third of the time, and the other two-thirds the water would be piled up.

Q. What effect did the government improvement have? A. Oh, that had a very great effect. That kept Calumet River right down to where—to a certain stage, all the while, substantially.

THE COURT: Q. Made when? A. 1868 or 1869, I won't be sure which.

MR DENT: Q. That would let the waters out? A. Certainly.

Q. The waters of the Calumet out into the lake? A Yes, sir.

Q. And keep the Calumet at a certain stage or about a certain stage, would it? A. There is a fall in Calumet River of a tenth of a foot to a mile, and when it had free access into Lake Michigan at Chittenden's bridge the water was thrown about four-tenths above Lake Michigan. When the water got above that it would run across into Hyde Lake. When it is the other way—when Calumet River was being drawn down and Lake Michigan was pretty low, then there would be quite a current from Hyde Lake into Calumet River and then *vice versa*.

Q. Have you ever observed low places, and water standing in low places between Hyde Lake and Calumet River at different points? A. Yes, sir; I have seen it run across from Hyde Lake into the river and from the river into Hyde Lake, south of the north line of section 19, I think it is.

* * * * *

Q. You spoke this morning of having driven over the road in particular—first not going over it with a buggy, but having been in there since. In driving since over the ridge, would you follow the ridge in driving? A. Well, I drove a good deal of the way on the east side of the ridge where it is more open.

Q. You can state whether you drove into Wolf Lake, or how it was? A. Yes, sir; I have driven into Wolf Lake several times to get around these places.

Q. What was the usual way of driving? A. Well, we used to generally drive into Wolf Lake, drive out about 200 feet where the water would just about come to the buggy box, and it was a good hard bottom all the way around.

THE COURT: Q. You mean to get around the marshy places? A. Yes, sir; to get around the marshy places. The sand had been driven in there and it was hard—a good bottom.

MR. DENT: Q. When you were there in April, 1885, what was the condition of water? What was the depth of water between Elm Island as represented on this map and the crescent-shaped island further north that you have been speaking about? A. Well, according to the best of my recollection, there was from six inches to nine inches of water over the ground. I know I got my feet wet between crescent island and the Smale Ridge. I got my feet wet in the water. I had boots on, but of course the sod sunk some. A part was the water, and part was the depression of the sod. It went over my boots.

* * * * *

Q. Was there not grass growing in the water along there close up to the higher land? A. Yes, sir. I think the water was deeper when you came to get into it than I thought it was—than it appeared to be.

Cross-Examination by MR. GREGORY.

* * * * *

Q. Do you know about what stage of water would be necessary in order to get through this strip of land between Hyde Lake and Wolf Lake at any point except where the cut is? A. I think that strip is about two feet above datum.

THE COURT: Q. What strip? A. Between Hyde Lake and Wolf Lake, that marsh divide is about two feet above datum. I call it marsh divide.

MR. GREGORY: Q. Continues, as I understand, between that and the ridge? A. Yes, sir.

Q. The ridge is higher, but you are now speaking of a lower

strip of land that is generally observed now between Wolf and Hyde lakes? A. That is it.

Q. How recently, Mr. Waite, have you been familiar with the situation of affairs at Wolf Lake? A. I have not been down there since 1885.

Q. Then, did your remarks as to the tendency of the water to become less in those lakes refer to the condition of affairs at that time? A. Well, not altogether. I have been very familiar with Mr. Cole's levels all the way through Hyde Park, and the levels he has taken, and with Mr Rossiter's levels, and Mr. McClellan's and other engineers' levels, and I have kept watch of it. I have made it—I am interested myself a little.

Q. So that your opinion is that from the causes you suggested there must be a tendency for the waters of these lakes slowly and gradually to recede? A. I think so.

Q. Thus uncovering more land? A. Yes, sir.

Q. Now, do you know how long Hyde Lake has been called Hyde Lake? A. I can't answer that question.

Q. Do you remember whether the entire lake—that is, Hyde Lake and Wolf Lake together—was ever called Wolf Lake? A. Not to my knowledge.

Q. Not to your knowledge? A. No, sir.

Q. It has always been, as far as you know, designated as two lakes, Hyde Lake and Wolf Lake? A. I went to Hyde Park to live in 1859, and at that time it was called Hyde Lake, and I have known it from that time to this.

THE COURT: Q. Since 1859? A. Yes, sir.

MR. GREGORY: Q. You said, I believe, that in your opinion a level of about two feet six would be a fair average level of the water in these lakes. Do you refer to any particular time? A. Well, I mean, take all the high water and all the low water and add it together; take and make an average.

THE COURT: Q. An average of two feet six above datum? A. Yes, sir; that is from five feet above datum to a foot below datum.

MR. GREGORY: Q. Did you ever know the water to be a foot below datum? A. It is so to-day, I understand.

Q. Who is your authority for it? A. Well, half a dozen told me so. McClelland told me so, and Rossiter, and Mr. Clark, the City Engineer.

Q. The water in the lake? A. In the lake; yes, sir.

Q. In Lake Michigan? A. In Lake Michigan is a foot below datum. That is what they tell me.

THE COURT: Q. Do you mean now? A. Yes, sir.

* * * * *

MR. GREGORY: Q. As a matter of fact, the Calumet is now continually open, is it not? A. Yes, sir.

Q. And when you spoke of certain conditions in which the Calumet was closed, and also Wolf River, that referred to conditions

existing some years ago? A. Yes, sir; before the harbor was made.

Q. Do you attribute the lowering of the water in Hyde and Wolf lakes to any extent to the improvement of Calumet River by the Government the deepening of the channel? A. I think it makes a stability in the water. I do not think there is as much fluctuation as there used to be.

Q. You think, in other words, it makes the communication between Lake Michigan and these other lakes more intimate? A. Yes, sir.

Q. And closer—a correspondence—closer? A. Yes, sir.

Q. Do you know about how wide this divide between the two lakes is in low water? A. Do you mean the—

Q. I mean in low water. I mean, practically, have you ever been down there when the water was low in Hyde and Wolf lakes? A. I have been down there when I thought it was 800 feet across the marsh divide.

Q. Eight hundred feet across? A. I should think so.

Q. About how recently, if you remember? A. It seems to me it was in 1869 or 1870.

Q. And since that time your impression would be that the tendency had been for the water gradually to recede on the whole? A. On the whole, yes, sir, unless there were other causes to counteract it. I think the whole country is growing dryer.

* * * * *

Q. I understand you to say, then, that you have never known this body of water * * * to be called as one body of water—Wolf Lake? A. I never have, sir.

Cross-Examination by Mr. Bennett.

Q. How soon after 1839 and 1840, when you say you came here, did you know about Wolf and Hyde lakes—that locality? A. My best impression is it was in the year 1861.

Q. You knew, however, from one source and another, very soon after you came here, that there were two lakes down there, and not one, and that they were called different names? A. Oh, I knew there was a succession of lakes through there.

Q. What I ask you is whether what is now called Hyde Lake and what is called Wolf Lake now were two separate bodies of water. How soon after you came here did you learn that? A. I think I learned it in 1860 or 1861. I think I learned it in 1860. I came to Hyde Park to live in 1859, and I think it was the next year that I became acquainted with the lakes. I think that was 1860.

Q. The personal knowledge you have acquired, then, in reference to the ridge between those two lakes, Wolf and Hyde, has been since 1860? A. Yes, sir. My personal knowledge down there, especially of that, has been since 1867.

Q. In making your estimate in those early times, immediately following 1839 and 1840, the mouth of Wolf River was open from one-fourth to one-third of the time? A. Yes, sir; according to

the best of my judgment, from all the information I can get upon the subject.

Q. From hearsay? A. Hearsay, and knowledge together, taken from these things and putting it all together.

Q. How many times prior to 1860 had you seen the mouth of Wolf River open? A. I can't say that I had at all.

Q. Not at all? A. I can't say that I did; but I can say that I did see it open in 1860, to my sorrow, too.

Q. Do you know whether it was artificially opened? A. No; it opened itself. I got in there and liked to lost a horse in there. They told me I could drive across.

Q. Is there any other time, that you now remember, of its being open? A. Oh, yes; I can remember other times when it has been open.

Q. How many? A. Well, I should say, to speak safe, six times; about that.

Q. In the whole period? A. Yes, sir; in the whole period.

Q. In 1867 you became personally familiar with it? A. Yes, sir.

Q. What year was it that you were Superintendent of Public Works in Hyde Park? A. From 1861 to 1869, I think.

Q. What year was it you went down to investigate in reference to opening the road? A. I think it was in 18 8.

Q. Did you make a survey there for a road? A. It may have been in the fall of 1867. It was immediately after annexation.

Q. You don't mean the annexation of the city now? A. No; I mean when that territory was annexed to Hyde Park.

Q. Did you have any difficulty in constructing a road over that ground between Wolf and Hyde lakes at that time? A. When I reported to the board there was no trouble in making a road there at all. That was the time I probed it every 100 feet.

Q. What was the year that you drove down below Smale's and tied your horse? A. I think that was in 1867.

Q. And you walked through the rest of the distance after you tied your horse? A. I did; yes, sir.

Q. You say you could have driven through if you had known the situation? A. Exactly. It was a harder bottom than I supposed it was—I was afraid of it, but after that I was a little more venturesome, and after that I drove right through—and it was covered with water, too.

Q. Did you have any difficulty with it? A. I did a little in getting through this old runway that I spoke of. My horse got mired a little, but not a great deal.

Q. Has there been any time when there was not a permanent body of land between Wolf and Hyde Lake, to your knowledge? A. No; I have never known any time but what there was land there. Sometimes it would be under water, but there would be land there.

Q. You speak of a point above the Field place where you say

there was once a channel between that and the McDaid place? A. Yes, sir.

Q. You never knew the channel was there? A. No, sir; never did.

Q. That was a mere theory on your part, from the character of the ground? A. That is it, exactly.

Q. Because you find a spot there fifteen or twenty feet wide where the muck is much deeper than it is either north or south, you conclude that a long time ago there must have been a channel there? A. That is it.

Q. That is merely theoretical? A. Yes, sir; theoretical.

Q. How long ago would you say there had been a channel in the formation? A. I think there was a channel there 100 years ago. I think it has filled up in that time.

Q. You are an engineer and you are testifying here upon your judgment? A. Yes, sir.

Q. Or is it theoretical? A. It is all theoretical, or at least that answer is.

* * * * *

Q. How did you come to speak of these localities on this ground between Wolf and Hyde lakes as "Islands," and why did you do it? A. Because I have seen them surrounded by water.

Q. Not long at a time, have you? A. No, not a great while at a time.

Q. Merely temporary water, wasn't it—surface water? A. That is all.

Q. Has anybody suggested the name to you? A. No, sir; I think I made the suggestion myself.

Q. Did you suggest it to Mr. Hardin? A. I did.

THE COURT: Q. How is that? A. I think I made the suggestion to Mr. Hardin that they were islands.

MR. BENNETT: Q. How long ago? A. I can't tell you that. I think when I went over the ground. That is my impression.

Q. That was in 1885? A. Yes, sir; April, 1885.

Q. Well, you did not mean when you spoke of these localities as islands that they were permanently surrounded by water, did you? A. No, sir.

Q. Or surrounded at any other time except in very high water? A. In high water.

Q. Have you ever heard anybody else, except Mr. Hardin, call what you call Elm Island by that name? A. Yes, sir; I heard Mr. Kleinman call it Elm Island.

Q. Who? A. Mr. Kleinman—John Kleinman. He said they used to call it Elm Island.

Q. Then if he had testified that he never heard it called Elm Island, he is mistaken? A. Yes, sir; he is mistaken. I remember now of going to Kleinman's house, and I remember of Kleinman saying that they used to call that Elm Island.

Q. Do you say that was John Kleinman? A. It was the oldest one of the Kleinmans.

Q. Abe? A. No, it was not Abe. It was John, the one that lives on Torrence avenue.

Q. Where did you locate this road that you were going to put through this land between these two lakes? A. Well, at that time I located the road just as near as I could on the ridge, avoiding those sharp curves.

Q. Where did you locate it between the McDaid place— A. A little east of his house.

Q. Was there a house there then? A. I think there was a shanty. That is my recollection.

Q. Was that in 1868, or before? A. That was in 1868, I made the survey down through there.

Q. Do you know who put it there? A. No, I do not.

Q. I want to ask you about the trees up at the north end, above Smale's and below Smale's, on the divide, their size and character. Were there large trees there? A. Yes, sir; some large trees, and quite old.

Q. Were there large stumps there at that time? A. Yes, sir.

Q. How large in diameter were the trees—the large ones—and the stumps? A. Oh, I think I have seen stumps two feet and a half across.

Q. Seen them larger? A. I have not a distinct recollection, but my impression would be if they varied either way they would be larger.

Q. Then there was large trees further on down? A. Yes, sir.

Q. What would be the age of those trees that you saw there, would you think? A. Oh, they must have been over 100 years old.

Q. On McDaid's tract midway down here at this point marked "Island"? (indicating on map). A. There is some very old trees there, too.

Q. How old trees did you see there? A. I don't think they are quite as old as the others, but I presume there is trees there seventy five years old.

Q. Were there any trees at the Field house—right at the house? A. I think there were.

Q. Did you notice some stumps of trees there? A. I think I did.

Q. Were there some large ones—how large? A. I don't think they were very large. I don't remember the size. I don't think they were very large, though.

Q. You speak of a floating island. In which lake was that? A. Hyde Lake.

Q. In Hyde Lake? A. Yes, sir.

Q. Was that about opposite where you found this ditch that you conclude theoretically— A. Yes, sir; at the west end of it.

Q. At the west end of it? A. Yes, sir.

Q. Out in Hyde Lake here? (indicating on map). A.. Well, I can't tell, exactly. I remember a man's being in a boat and pushing against it, and I drove my horse up to the east and it seemed to move; that is my recollection of it.

Q. Was that high water then? A. I think the water was about six inches deep over the marsh, according to the best of my recollection.

Q. How do you explain the fact, if it is a fact, that that is solid ground now? A. Well, I can't explain it, but I know it is solid ground, and sand underneath the muck, and I can drive anywheres over it, and have driven over it when it is covered with water, with the exception of that one place, and that was the only one, I think.

Q. You say there were a few places where there were breaks through where the water seemed to flow? A. Yes, sir.

Q. Don't you recollect one about a little south of the south line of 20 where there were evidences that it had been cut through that ridge? A. Well, I once did think there had been a channel cut through there, but I had my doubts about it. I think high water cut it away there.

Q. Is that the place where you saw? A. That is one of the places, and the other is below.

Q. Below? A. Yes, sir.

Q. North? A. I mean south of Smale's house. These are very singular openings, and one might, without stretching his fancy, say it seems to be cut through.

Q. If it was proven in this case there was a hole cut through— A. Well, then I should believe it was cut through, of course. That would be very natural.

Q. On the whole you think there has been very little change down there since you first knew it? A. Very little.

Q. The land has remained about the same, and the water about the same? A. Oh, I think the tendency of the marshes is to raise, and I think the tendency of the water is to lower.

Q. Well, that is so everywhere in this country where it is settled up, isn't it? A. I think so—in new countries.

Cross-Examination by MR. MARSTON.

Q. I understood you to say that in 1867, when you went down there, the west bank of Wolf Lake below the channel was a defined bank? A. Yes, sir; I say that, and it is to-day.

Q. And that west of that bank was a ridge? A. No, I don't say that.

Q. Well, that is what I want to know? A. Slopes west—slopes down onto the marsh.

THE COURT: Q. West bank of Wolf Lake at what point? A. What is called Reese's Point.

MR. MARSTON: Q. Below the channel? A. Yes, sir. It seems to come up quite bold and then slope towards the west.

Q. How wide, in your opinion, was that ridge at the time you

were down there? A. Well, name one place and I will answer it.

Q. I mean below the channel? A. Well, it was not uniform. It tapered out a good deal. It begun there and kept growing wider and wider all the way down.

Q. Where did it taper off to nothing? At the north? A. Yes, sir.

Q. How wide was it about midway down? A. Well, it commenced about, according to my recollection, some 300 feet south of the old channel across there, and then it widened out gradually, and then the timber commenced. Then it begun to be timbered. When it got down to Reese's house I should say it was 1,000 feet wide, and when it got down below it was half a mile wide, and the ground continued to grow, like, until it got clear down to the head of the lake.

Q. That is the distance between the two lakes, then, down about Reese's house—was about 1,000 feet? A. I should think so; yes, sir.

Q. Was that covered with timber, that ridge? A. Yes, sir; originally, and north of Reese's house it was covered when I was there.

Q. About how far north of Reese's house did the timber extend? A. From 1,000 to 1,500 feet; say 1,000 feet certainly.

Q. And about how far north from where the timber stopped did the land extend—the ridge, I mean? A. The ridge kept growing less and less until it got into a marsh, may be 300 or 400 feet.

Q. And then you say there was an opening? A. There was an opening cut through there by boatmen to get their boats from Wolf Lake to Hyde Lake.

Q. Was there much marsh between the end of the ridge and the opening? A. Very little, very little; probably 100 or 150 feet of marsh between the end of the ridge and the opening.

Q. So that the ridge run up about 150 feet? A. I should say so, according to my recollection.

F. C. ROSSITER, a witness called on behalf of the defendant Gertrude H. Hardin, was duly sworn, and testified as follows:

Direct Examination by MR. DENT.

Q. Please state your name? A. F. C. Rossiter.

Q. What is your business, Mr. Rossiter? A. Surveyor and civil engineer.

Q. How long have you been in that business? A. About twenty-five years.

Q. Where? A. Chicago and vicinity.

Q. Please state whether you have known, and how long you have known, Wolf Lake and Hyde Lake, and the region in which they are situated? A. Since 1870, or thereabouts. I have not got the first record of the time I was there. My first record that gives a date is 1872.

Q. What name was given at that time to this water or these waters, if you know? A. The common name known in Chicago at that time was Wolf Lake, and I don't think that what is now called Hyde Lake was known here at all as Hyde Lake. It might have been known on the ground—that I don't know—or in the vicinity of the lake itself, but in Chicago it was not generally known as Hyde Lake at all at that time.

Q. What part of the land in the vicinity of the lake did you first survey, according to your recollection? A. The first land that I have a record of since the fire is the northeast fractional quarter of section 32. This tract of land joins Wolf Lake on the south and is less than half a mile wide, and adjoining the State of Indiana on the east, lying southeast of what they call Reese's tract.

Q. When did you make any other survey, and what was it? About when, the next survey you made? A. Well, two or three years later I made a survey of a tract of land, or attempted to survey a tract of land, the description of which ran to the southeast corner of the northeast quarter of section 19. It would lay on the quarter section line of section 19 produced east to the east line of section 19—north and west of those two lines, a portion of it being in Hyde Lake and the other portion being on the land to the west of Hyde Lake.

Q. Have you surveyed other lands around the lake?

MR. BENNETT: I do not see the materiality of all this.

THE COURT: It merely shows his familiarity with it?

A. Yes, sir.

MR. DENT: Q. About how extensively have you surveyed lands around the lake? A. Well, I presume I have been on that lake and the borders of it in Illinois twenty-five or thirty times, perhaps forty times, in making surveys.

Q. In different parts? A. Yes, sir.

Q. What lands have you surveyed? You may state generally or specially? A. I have surveyed the whole outlines of sections 30 and 31 in order to get a certain portion of land lying on the eastern edge of the northwest quarter of section 30. It would include the tract of land through which the natural outlet, as it is termed, from Hyde Lake into the Calumet River, lays. That is one tract. I have surveyed, I think, two different times, the meander lines around the whole, or nearly the whole, of Wolf Lake and Hyde Lake in Illinois.

Q. How could you survey the meander lines? What enabled you to survey it? A. The government notes, if you want to know the data from which I took it?

Q. Yes, that is it? A. The government notes.

Q. In following the government notes did you find posts or evidences of these by which to ascertain the meander line? A. On the meander line—you mean the section corners?

Q. Well, did you go by courses and distances, or how did you ascertain the meander line? A. The section corners—I have lo-

cated meander corners on the section lines, then run by courses and distances given in the government notes between the meander posts which I located on the section lines.

Q. You can state whether you have surveyed all the land surrounding the lake in Illinois in the course of your various surveys? A. Well, it amounts to that. Of course, in section 20 I never have had any definite tract of land to survey—any description that might be given me. I have never had a tract of land in section 20 for that purpose. But in sections 30, 31 and 32 and 19 I have.

Q. Did you locate the meander posts on the line between sections 19 and 20? A. Yes, sir.

Q. When did you do that? A. The first time was at the time that I mentioned, perhaps two or three years after the fire. I have not got that survey with me, so I cannot give you the date. It was the time I surveyed that property.

THE COURT: Q. You located what? A. Meander posts on the line between sections 19 and 20.

MR. DENT: Q. How did you find the lake with reference to that point? A. At that time?

Q. Yes, sir—whether it extended north? A. I will change my testimony a little there. At that time I did not locate the meander posts. I attempted to locate it and could not get to it.

Q. Why not? A. Because the water was too high. The water came up very close to the borders of the lake or the edges of the ridge.

Q. What was the depth of water where that corner would be? A. Well, I did not get into it. It was pretty deep.

Q. Or to where you went? A. Well, I went in as high as I could go with my boots and had to abandon the survey.

Q. You can state probably the depth of water in feet—or how it was? A. From one to two feet deep, at least, I should say.

Q. Please state whether the lake at that time extended north of that line?

THE COURT: North of the line between sections 19 and 20?

MR. DENT: Q. North of the half section line between sections 19 and 20? A. Yes, sir.

Q. How far north did it extend? A. Nearly thirty chains. Perhaps ten or more chains north of the meander post—meander corner.

Q. You mean a post or corner, where the corner would be? A. Well, there has been a post there most all the time. I do not know that I have ever known the time when there was no post there.

MR. GREGORY: You mean the east and west half section line of 19 and 20?

MR. DENT: Yes, sir. The east and west half section line would be here? (indicating on map).

THE WITNESS: That is what I understood the question to be, the east quarter of section 19. I stated it was about thirty chains to the north of that.

THE COURT: Q. Of what? A. Of the east quarter corner of section 19. The east quarter corner of section 19 would be due east of the center of the section at this point (indicating) in the lake, and the water at that time was nearly thirty chains north of the quarter corner—three-eighths of a mile.

MR. DENT: Q. How near did the lake at that time extend its west shore to the Indian Ridge road? A. Well, it was right up against the foot of the ridge. I don't remember now just how close the road is to the edge of the ridge, but it covered the whole of what would be called slough ground there on the east of the ridge.

Q. What was the character of the bank, if there is a bank there, on the west shore of Hyde Lake near Indian Ridge road? A. It is a ridge that is from four to six feet above the marsh ground or slough ground, and is what might be termed a sand ridge covered with timber—the most of it is.

Q. The Indian Ridge road runs over it, does it? A. Yes, sir.

Q. How near to the lake or to the bank of the lake? A. Well, from twenty-five feet to 250 or 200 feet, from the edge of the slough ground or low swamp land.

Q. You can state whether that bank—the border of the lake—extends all the way along on the west side of Hyde Lake? A. It does not.

Q. Where is there any break in it? A. About 150 to 200 feet, or maybe 300 feet, south of the east and west quarter section line, or east and west center line of section 19, there is a break in the ridge.

Q. What is that—what is the nature of that? A. I think that there would probably be thirty to forty or fifty feet that would be nearly the whole width of this break, a slough—low, marshy lands. Whether it ran clear across and was slough, marsh land, I could not tell, but there is road built across it now, so that I have not seen it in its original condition.

Q. Going south towards the southern end of the lake, how was that border? A. From this point it immediately rises again to a high ridge.

THE COURT: Q. Going south or north? A. Going south, and becomes five to six feet in height above the slough ground, and is a good deal of the same nature that the ridge through the northern part of section 19 is. It is a rougher ridge, not as smooth through the central part of 19 and southern part of 19 into 30.

MR. DENT: Q. You can state whether the lake has a well-defined bank along that part of which you have now been speaking, and if there is any break in it you can state that? A. Considering the lake as including the slough or marsh lands, there would be a well-defined bank. The Indian ridge would form a well-defined bank to that.

Q. Going south towards the half section line of section 30 and

29 is there any break? A. Yes, sir; a little north of the center of section 30 is what is called the natural outlet to the lake.

Q. And then how wide a place is that or was that? A. I should judge that the place that would be called the natural outlet itself would be from 30 to 50 feet wide, and then gradually sloping or rising rather to the north until it—perhaps 200 or 300 feet, until it got to the height of five or six feet, or four or five feet, and gradually rising, but it does not rise as high to the south of the natural opening as it does to the north.

Q. Going down to the southern point now of Wolf Lake, how is it from that natural divide or outlet, whatever it may be called, in section 30? A. You mean about the description of the ridge?

Q. Yes, the border? A. The ridge from the natural outlet at the center of section 30 runs very nearly due south—would follow down very closely to the north and south quarter section line of section 30 into section 31, while the lake itself bears to the east of that, making a large, wide flat between the ridge and the lake proper at the southern end—slough ground and swamp.

Q. What was the character of the land where that outlet was over section 30 towards the Calumet, between the lake and Calumet River? A. The outlet runs to the west 200 feet, maybe 300 feet, from the lake, and opens into a large slough, the slough running to the southwest for perhaps five, six or seven hundred feet, and there joins onto a larger slough that runs in a northwesterly direction. The slough into which the natural outlet opens only runs to the north of the natural outlet a few hundred feet, being in other words an arm of the main slough which lies to the west of the quarter section line—north and south quarter section line, and extending down into section 31.

* * * * *

Q. What does that terminate in, if you know? A. It terminates in Calumet River.

Q. Near the forks of the Calumet? A. Oh, you mean at the south?

Q. Yes, at the south? A. Well, I should think so. I think that that continues the whole distance down very near to the forks.

Q. How was the outlet, and how is the outlet from Hyde Lake into the Calumet River as to whether it is deep or wide? A. The natural outlet?

Q. The natural outlet, yes, sir? A. That portion which lies east of the slough and west of the river is middling solid ground, and about 200 feet in length. The slough into which this outlet opens is mirey, and considerable black soil, and I should think it would average 100 to 150 feet in width.

Q. How deep is the water in that outlet? How deep have you noticed it? A. Well, the mire and water is very deep. I don't know how deep. I have attempted to cross it with high boots on and could not do it.

Q. Has there been a change in that outlet, a change of the sur-

face? A. Perhaps I don't understand your question. Did you state the mouth of the outlet—about 200 feet in length?

Q. I wanted you to state? A. I understood you meant the general outlet, including the slough. The outlet itself is not very deep. I think I have seen the water in it when it was six to eight inches deep, maybe a foot.

Q. That is next to Hyde Lake? A. Next to Hyde Lake, yes, sir. The outlet proper, about 200 feet in length, and there was a ford, perhaps 150 feet west of the lake, and that was sandy bottom so teams could safely drive through it.

Q. Have you noticed the government plat of this fractional township 37 north, range 15 east? A. I have had a copy of it, and have studied it thoroughly in a general way in my surveys.

Q. This is a representation of it from the general land office (handing same to witness). I will put it in your hands and should like to have you state what would be the topography of that township as shown on that plat—what surveyors would understand to be the topography of that township? A. We could understand it was a wet township.

Q. What would show it was wet? A. The contour lines running along the land; for instance, taking the north and south section lines between 19 and 20, between 18 and 19, and between 7 and 8, they are crossed in several different cases by contour lines running east and west, or nearly so. The majority of the land lying to the west of that line, and slightly colored in this map which I have in my hand, would represent wet lands. Those portions of land uncolored, lying in between, would represent dry lands. I don't know how I could explain it better.

Q. Is there anything showing through the map or on the back of the map that would indicate the character? Are there colors? A. That is the coloring that shows through on the face of the map, and that I testified to, that portion which is indicated by colors. The coloring is done on the back side of the map.

Q. What would the irregular lines on the map indicate? A. The irregular lines, except that portion which shows the river would indicate the lines between the dry and the wet land.

Q. Something like ridges? A. In many cases it would represent ridges; yes, sir.

Q. What would you understand from that map as to the lands near the Calumet River, whether they would be high or low? A. It is all low, except in one single instance, which would be on the west bank of the Calumet River in the northwest quarter of section 18. There is a small place there, about a quarter of a mile wide, which would indicate high lands.

Q. I understand you are speaking of the map of the government survey of 1834–5? A. Yes, sir.

Q. State whether the Calumet River, according to that map, seems to be represented as having banks? A. There is nothing on this map that would indicate that it had any well-defined banks? I

should conclude from this that it had no well-defined banks if I had never seen it before, because of the slough grounds adjoining it east and west.

Q. Would that indicate that there was land that would be overflowed with water? A. Yes, sir.

Q. That is beyond the regular shore line of the river? A. Yes, sir.

Q. On either side? A. Yes, sir.

Q. What is the extent of the Calumet River—what sources has it, if you know? A. As feeders?

Q. Yes, sir. A. The Calumet River—what is called the Grand Calumet—extends over into Indiana in the neighborhood of eight to twelve miles.

Q. That is, it takes its rise over there, does it? A. Well, it was one of its outlets into Lake Michigan, originally, but would be fed by the ground adjoining it on either side, and for some years back it has been closed up—permanently closed; now becomes a feeder to the Calumet River that runs out at South Chicago. What is termed the Little Calumet River from the forks at the southwest corner of section 31 in this township runs or bears to the west nearly six miles into Blue Island, and then curves around to the south and crosses the State line and runs over into Indiana in the neighborhood of forty miles.

Q. Has that any connection with the Illinois and Michigan Canal or the feeder of the Illinois and Michigan Canal? A. The feeder of the Illinois and Michigan Canal was connected with the Calumet River at Blue Island.

MR. GREGORY: Q. Is that the Little Calumet? A. That is the Little Calumet; yes, sir.

MR. DENT: Q. Where did those two rivers, the Little Calumet and the Grand Calumet, form their junction? A. Near the southwest corner of section 31, in this township.

Q. How far from the lake of which you have been speaking? A. From Wolf Lake, about a mile from the southern end.

THE COURT: Q. Near the southwest corner of 31? A. Section 31; yes, sir

MR. DENT: Q. What is that ridge on the west side of the lake called, over which the road runs of which you are speaking? A. Indian Ridge.

* * * * *

Q. Now, as to the fractional southeast of 19, you may state how it appears from the government plat, the survey of 1834, and also what you know about it. A. That would indicate all wet land except the ridge.

Q. And how does the ridge run as to the lake? A. The ridge runs nearly parallel with the lake, and west of it.

Q. Now, if you will speak of the last of the lands in section 20 near the lake—speak first from the government plat and afterwards

from your knowledge from surveying and examining the lands? A. The whole of section 20?

Q. The whole of section 20, yes, sir. A. The whole of section 20 on the map except the small tract at the northeast corner is represented as being low lands. My knowledge of it is that something over half of the lands would be low; almost the whole southern end of the section, as represented on this map, would be low ground. The north end would be somewhat higher.

Q. What would you call that low ground? A. Marsh or slough ground.

* * * * *

Q. Now, I will speak of the next line further south. That would be the line between sections 19 and 30, wouldn't it? Have you surveyed that line? A. I have surveyed the whole of that line.

Q. How did you find that line as compared with the government plat representing the lake? A. As far as the ridges and sloughs were concerned?

Q. Yes, sir. A. Well, it is all, except occasionally a ridge across it, low land.

Q. Where did you find the point of intersection of the lake on that line as compared with the government plat, whether as shown on the government plat, or how? A. Well, the meander post I located betwen sections 19 and 30 would be on land that you would not hardly term as a ridge nor you would hardly term it as slough ground either, but half way between the two.

THE COURT: Q. The meander post between sections 19 and 30—what? A. Would be on land that you could hardly term slough ground or ridge. It would be about half way between the two.

MR. DENT: Q. And how near the bank of the lake would that corner be? A. Well, that would depend entirely on the—that is, if you speak of the lake—as far as the water was concerned, it would depend on how high the water would be in the lake.

Q. At the time you made the survey the land was exposed or out of the water, as I infer? A. Yes, sir.

Q. And how far out of water away from that point? A. Well, I should say 200 feet.

Q. How would the remainder of that line running east be? Where would it be? A. It would be all in slough ground except perhaps fifty or sixty feet from the meander post—the slough ground would commence.

* * * * *

MR. DENT: Q. At some stages of the water the remainder of the line from the corner you speak of now—the post as you so call it, would be in the water, would it—the water of the lake? At the time of the survey the water was fifty or sixty feet east? A. Yes, sir; that would be what you might term solid ground.

THE COURT: Q. Fifty or sixty feet east? A. Yes, sir; then com-

mences the slope. Do you ask what would be the nature of the land?

MR. DENT: No; I wanted you to state whether you mean that the fifty or sixty feet would be dry ground at some times, or whether it would be always dry? A. It would not always be dry. In high water it would be covered clear to the meander corner and beyond with water, but in ordinary stages of the water in the lake it would be dry ground, or nearly so, and is in the nature of permanent soil.

* * * * *

Q. Did you run the south line of section 30 east of the lake between sections 30 and 31? A. Yes, sir.

Q. Have you surveyed that land? A. Yes, sir; a good many different times.

THE COURT: Q. Lying between sections 30 and 31? A. East of the lake. This (indicating) is the section corner between sections 29, 30, 31 and 32. That would be the line from that section corner west to the lake which he has just asked me about.

MR. DENT: Q. How did that line correspond in length with the government notes before you reached the lake going west? A. Well, measuring west on that line we would reach slough grounds before we got to where the meander post was noted as having been set by the government.

Q. Slough grounds—how high, or about how high, in elevation?

THE COURT: Q. Slough grounds before you get to what? A. Where the meander post was noted in the government survey. I can tell the exact elevation of it by looking a little further on that map.

MR. DENT: Q. You may step there and say what would be the elevation of it? A. At the section corner between sections 29, 30, 31 and 32, the ground would be about five feet to five and a half in height above city datum. At 50 feet west the ground would be four feet to four and a half in height. At 100 feet west it would be three and a half in height. At 150 feet the ground would be about four and a half to four and three-fourths in height, and the meander post would be a trifle less than 200 feet from the section corner.

Q. And at what elevation of ground? A. The meander post?

Q. Yes, the meander post? A. About three and a half feet in height above city datum.

Q. How is the ground west of that on the same line projected or extended? A. What is the ground there?

Q. Yes, sir. A. It runs off; that is, it slopes down into the lake.

Q. Is it a gradual slope, or rather sharp? A. Well, it runs down in fifty feet about a foot and a half in elevation, so that fifty feet west of the meander point the line would be about two feet above city datum. The meander post would be right there (indicating).

MR. STRONG: Q. That is where it should be if there was any? A. Yes, sir.

MR. DENT. Q. You may state whether extending that line, which would be the south line of section 30, from the southeast corner of section 30 west, it would be in the lake apparently? A. Yes, sir.

Q. Take the line from the east to the lake, that is the southeast corner of section 30 over to the lake on the east, how did you find the lengthened line compared with the government notes—notes of government survey? A. To the lake?

Q. Yes, sir. A. That line corresponded with the government distance and is a well-defined bank at that point, so that there could not be any question about that distance.

Q. How would the remainder of that line be extended east—projected east? A. All in the lake.

Q. Now, go north, if you please, and if you made a survey from the southeast corner of section 30, what was the length of line you found in surveying, comparing it with the original government survey? A. There is a post set there, what is termed a meander post. The distance is practically correct; maybe half a foot out.

MR. GREGORY: Q. Are you referring to the fractional section corner of 29 and 30? A. Yes, sir; but there is no defined point there that you could say that it is the point where the government intended to set the corner, because the land is so near level.

MR. DENT: Q. I understand you, then, the distance corresponds with the government notes? A. Yes, sir.

Q. You have already explained you do not find any posts? A. Well, I do not find the government posts in any place, but I do find in almost all of these points stakes that have been set by surveyors in recent years, and there is a corner there now at the present time.

Q. What do you find with reference to objects that are designated in the notes of the government survey? Do you find any of those? A. Witness trees do you have reference to?

Q. Yes, sir? A. I have in some cases. Just at this moment I cannot tell you whether I have found any at any of the meander corners or not, without referring to my notes and the government notes.

Q. What would be the nature of the line extended north from the point you have been speaking of, the east section line of section 30? You spoke of going to the fractional corner there? A. Yes, sir.

Q. What reference would that have to the lake? I wish to ask you whether the remainder of the line would be in the lake or not? A. For some little distance, perhaps several hundred feet, the line would pass over land that in ordinary stages of water would be dry. I think a small portion of it would be in a slough until you reached what has been shown to be the artificial cut between the two lakes, and north of that the most of it would be in the lake—the

whole of it would be in the lake, and the most of it would be under water, at an average stage of water. Commencing at the section corner of 29, 30, 31 and 32, and running thence north to about something less than quarter of a mile, would be the meander post. I don't remember the distance. Then, from that northerly the most of it would be in the lake. Here (indicating) would be a small ridge directly north of the meander post, and there is perhaps a small slough, perhaps 200 or 300 feet wide, and then you would strike that ridge again maybe 300 or 400 feet in length until you came to the artificial cut or opening between the two lakes. From that, northerly, would be all in the lake.

Q. That land would practically be from the corner post you speak of in the lake? A. Practically, yes, sir.

Q. That would be so, if I understand from that plat, that is, it would be in the lake nearly all when the water would be at two and five-tenths feet above datum? A. Yes, sir; I stated at an average height of the water it would be as I have described.

Q. Supposing that average to be two and five-tenths feet above datum? A. Yes, sir; it would be about as I described it then.

Q. Going north to the north side of the lake now, what is the character of the land comprising fractional section 20 as shown on the government plat and from your surveys of it? A. The whole section?

Q. The southwest of 20 as shown on the government plat? A. As shown on the government plat, that would indicate slough ground—low, wet ground; but on the ground the most of it is a ridge; that is, the tract of land that is called the southwest fractional quarter of 20 and marked on the government map 4.53 acres.

Q. You can state whether a part of that as represented by the government field notes was submerged or not? A. Yes, sir; the western point of the land and the southern point—the western point for quite a large distance would be submerged at ordinary stage of water, and the southern point would be, too.

Q. That is the southwest of 20? A. Southwest of 20, yes, sir. There would be probably about one-third or one-quarter of that western end that would be submerged in an ordinary stage of water.

THE COURT: Q. One-quarter of what? A. One-quarter of the four and a half acres.

Q. Would be dry land? A. No, sir; would be submerged. At the southern point, 300 feet south of the center of section 20, there would be a small portion, maybe fifty or sixty or seventy feet wide, that would be submerged at, perhaps, an ordinary, or a little higher than an ordinary, stage. As the ground now shows, it is what you would term slough ground. Perhaps water two and a half feet might not possibly cover it, but three feet would cover this piece at the south corner.

MR. DENT: Q. Southeast corner? A. Southeast corner. It is a wild growth of grass and spongy soil, so that when the water is at an average stage you would have to be very careful about going

in, for fear you would go over the top of your boots; it is very spongy, and still the water might not be over the top of the soil at that height.

Q. Now, have you found the corner which would be the middle of section 20, I suppose? A. I have never definitely located it. I know within twenty-five or thirty feet of where it is and where it should be.

Q. Have you run the lines from that corner west and east, and also south? A. I have run the lines west from that corner, but never east. I have run the lines south also, but never north.

Q. Please state, in running the line west, whether you found where the corner was fixed by the government surveyor on the south line of section 20, west from the center of that section? A. You could not go onto the south line of section 20 west from the center of the section.

Q. The center line? A. The center line of a section is never run by the government. This corner, at the center of section 20, which would be where the figures are represented on this map, was never located by the government. They never go inside of a section. They confine their surveys to the outside of the section only.

Q. I understand you now that a surveyor would not be expected to locate a corner there, because he would not survey the center line of a section? A. No, sir.

Q. But as shown on the government plat, have you made a survey to see if the line is there as represented? A. I don't know as I quite understand you in that. Is your question to find out whether in my surveys the center line of section 20 is properly located or approximately properly located as it is now? Is that the question?

Q. Approximately? A. It is approximately. In finding that out, or in making my test to get that, I have made the survey from the meander post on the line between sections 19 and 20, which would be 22 chains south of the given corner of 19 and 20, and run my meander lines to the northeast and then to the southeast, and thence to the east, passing east and west quarter section line of 20, and also crossing the north and south section line of 20, and from that I made what we term traverse and showed that the line as located there—the corner located there—is approximately correct, but whether it is within fifteen or twenty feet, I could not tell you.

Q. I wish to ask you whether the remainder of the center line of section 20, running east, which would also be the center line of section 19, west from the southwest corner of section 20, would be in the lake, other than as represented on the government plat? A. As I understand you, it would be this east and west center line of section 20?

Q. Yes, sir. A. From the point which I have already testified to, as shown by the larger map as being submerged, that

line from the west would be all in the lake as far as section 20 is concerned.

Q. How far south from the center line of section 20 would the line be extended before it would reach the lake at that stage of water which you have represented--2.5 feet, for instance? A. Probably 250 to 300 feet.

Q. You can state whether the remainder of the line would be in the lake? A. The remainder of the line would all be in the lake.

THE COURT: Q. What is that 250 or 300 feet? A. The distance from the center of the section to the lake at a stage of about two and a half feet. From the center of the section south of the quarter section line of 20 would be from 200 to 300 feet before you reached the lake. Then the balance of it would be all in the lake.

MR. DENT: Q. And the remainder of that line extended south, the center line of section 20 and the center line of section 32 would be in the lake, wouldn't it? A. Well, it would be in the lake; except when you came to the south line of section 32, there would be over half of section 32 that would not be in the lake—nearly three-fourths that would not be in the lake. One-quarter would be in the lake of section 32 of the north and south section line.

Q. Part of the center line of section 32, running north and south from the center of section 32, would be south of the lake? A. Yes, sir; the north one-half.

Q. What would be about the distance? Can you tell by that map the length of that line from the center of section 32? A. It would be about 1,000 feet from the center of section 32 before you would reach the lake at the height of two and five-tenths feet.

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Adjourned to Wednesday, November 25th, 1891, at 10 o'clock A. M.

November 25th, 1891, court met pursuant to adjournment at 10 o'clock A. M.

Direct Examination of the witness ROSSITER continued by MR. DENT.

* * * * *

Q. I understood you to say yesterday that certain section lines which were run intersecting the lake—

MR. GREGORY: Which lake?

MR. DENT: The lake as represented on the government plat. You have noticed the field notes, have you, as to what they state in reference to the government survey? A. Yes, sir.

Q. In running those lines how did you find the corners, with reference to elevations or with reference to the apparent border of the lake? A. I found them so far as the border of the lake is concerned to be correct.

MR. DOUTHART: I move to strike that answer out.

THE COURT: No, sir; Chancery never strikes out anything.

MR. DENT: Q. You spoke yesterday of having surveyed the meander line, and also spoke of meander posts. Why did you use the phrase meander posts?

THE COURT: I think he has explained that.

THE WITNESS: No, sir; I did not. He asks if I understand why did I use the word "meander post."

THE COURT: You said because the government survey referred to meander posts. A. I think I am mistaken in regard to that. It is the custom among surveyors to call them meander posts. The government notes, if I recollect rightly, called them "fractional section corners," but we have other fractional sections than those that border on lakes and rivers, which are never—cannot ever be termed "meander corners," and so, to designate between fractional section corners which have no meander lines run from, and others which meander lines have been run from, surveyors have become accustomed to naming those "meander corners" or "meander posts," and for that reason I have termed them "meander posts" here. It is not because the strict government notes call for such.

Q. You do not mean to say that the government notes do call them that? A. No, sir.

MR. DENT: Q. Please state whether, in running the meander line, there were any posts set by the government survey? A. The government set the fractional corners where they bordered on the lake, but the understanding is, from reading the notes, that they set no other corners. They set no actual posts at the angles of their meander lines; it was only the fractional section corners that were actually set.

Q. Posts were set in surveying the lines of the sections, were they not? A. They were set at all the corners. The section corners, and the fractional section corners.

Q. Then afterwards followed, I suppose, the survey of the border of the lake to make the meander line? A. Yes, sir.

Q. And what did the surveyor do then? A. He simply ran the line, without setting any corners, at the angles, taking the fractional section corners as he had set in the original survey for subdividing the tract of land, and run from those courses and distances, closing on each fractional section corner as he came to it.

Q. Did you find anything on the meander line to indicate any corner other than at the section lines? A. No, sir.

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Q. Is there anything in those field notes that would indicate the height of the water in the lake, with reference to the present city datum?

Objected to.

THE COURT: What field notes?

MR. DENT: The field notes are already in evidence.

MR. GREGORY: I suggested that question. I should suppose that would be a question of some expert judgment. The field notes

show certain things, as to the depth of the water—the line was run from point to point in such a depth of water. That was before the datum was established which was the low water mark in 1847. This was in 1834 and '35. Now, if the witness can examine these field notes, and with his knowledge of the ground, and experience as a surveyor, can state what that indicates, the height of the water was, with reference to the datum afterwards established, I should suppose that would be competent evidence, and it might be quite valuable in determining the stage of the water at that time.

THE COURT: You mean the government field notes of 1835?

MR. GREGORY: Yes, sir.

THE COURT: As figures indicating the depth of water?

MR. GREGORY: At some points. They indicate that they run through two feet of water, or something like that. There are statements to that effect.

THE COURT: Do you wish to show what that two feet meant with reference to city datum? It would be a deduction

MR. GREGORY: If this witness from his knowledge of that ground there is able to give any light on this question, I think that would be proper.

MR. DOUTHART: This datum was not established until after this survey was made. Now then, the survey certainly was not made with reference to that datum, and this witness didn't know what the height of water was then. If the datum was not known, how is it possible for the witness to state what the surveyor who did that surveying did not know himself?

THE COURT: We have the presumption that when he said two feet of water that he meant two feet of water on top of the ground. If the ground has not changed you could ascertain what that meant with reference to city datum. There is evidence tending to show that matters have not changed down there—did not change at all until the opening up of the outlet through the Calument River, and there is other evidence going to show that there has been a recession of the water for a great many years. It appears to me it might have some bearing on the supposition that the ground has not changed—did not change from 1835 until the establishment of the city datum, to show what the height of two feet of water would be with reference to the city datum afterwards established, supposing the ground was the same as it was in 1847, when the city datum was established. I will admit it subject to objection.

MR. DENT: Q. Is there anything in those field notes that would indicate the height of the water in the lake with reference to the present city datum? A. There are figures in there from which I can figure the elevation of the water at that time from city datum.

Q. What figures, if you please? A. The notes have reference to the section line between sections 19 and 20. I think that they call for water of from six inches to forty inches deep. If that is correct—

Objected to by MR. DOUTHART.

THE COURT: I think there ought to be a reference to the notes themselves. I think this testimony should be explanatory of the notes themselves.

THE WITNESS: Is there any objection to my looking at the notes?

MR. DENT: Q. I have here a copy of the field notes with reference to the line that was run south between sections 19 and 20 beginning at the northeast corner of section 19 or the northwest corner of section 20. The notes read thus: "South between sections 19 and 20 in township 37 north, range 15 east of the 3rd principal meridian, 7.50 chains road, course northwardly, 12 chains enter marsh, bears southwest." Just below that, "22 chains intersecting northwesterly margin of lake, where set a post," and then gives the witness trees, and that closes with this, "Marsh, water from six to forty inches deep." A. That is the one that I had reference to.

Q. Please explain what that would mean, or what your inference would be as to the height of water from your knowledge of the ground and surveying it?

Objected to by MR. GOUDY.

MR. GREGORY: I suggest that if the witness desires to look at the notes, he ought to before answering.

THE WITNESS: If that is satisfactory, I am satisfied with it, because I have read them over several times. But the only reason why I qualified it was because I hadn't read it over for some little time, perhaps several months, and there are several other places in the notes where it speaks in that way. I am satisfied with that.

Objected to.

THE COURT: I don't think his inference is admissible. I suppose what you are driving at is this: Six to forty inches of water, what would that be, with reference to the city datum, supposing the soil under water to have been the same then as it was at the time the city datum was established? He certainly can tell. It was established in 1847, and if the soil under water was the same in 1835 as it was in 1847, he could certainly tell what it would be at city datum. He may answer, subject to objection.

MR. GOUDY: I understood your Honor to say he could not give his inference. Let him put a legal question.

THE COURT: Put your question.

MR. DENT: I just read from the field notes as to the depth of water reported by these original field notes. Now, you will please state as to what that would show as to the height of water, taking the city datum as a standard or basis?

Objected to, and objection overruled.

A. It would show 5.5 feet above city datum.

THE COURT: Q. What would show that? A. An elevation of three feet and four inches, which is forty inches.

Q. It says from six to forty inches? A. I would not take the total depth if the deepest place that they found was forty inches.

I have taken the levels over the whole length of that between fractional section corner and the ridge, and the lowest point of natural land is 2.2 feet above city datum, which added to three feet and four inches would give me five and one-half feet.

MR. DOUTHART: Then the land has changed since the survey? It says six to forty inches? A. That was the depth of the water—six inches to forty inches. The land under that water—its lowest part is 2.2 feet above city datum, and the water was three feet and four inches deep, which would certainly make it five and one-half feet.

MR. DENT: Can you point out on that map, that line, and explain the elevations on either one of those lines? A. Yes, sir. This point, which I now point to, is the corner of sections 19 and 20, from which the government survey began, and they ran south towards the lake, the distance represented on this map, including the total distance given on the goverment notes, twenty-two chains. The government notes call first for seven chains and something to a road; twelve chains and something to low ground, or leave ridge or marsh or something of that kind—twenty-two chains is the corner of fractional sections 19 and 20. I have leveled from the twenty-two chains point north clear to the section corner.

MR. GREGORY: I would like to have the witness state when he says the lowest ground was 2.5 above datum, at what date that level was taken?

THE WITNESS: The last date when levels were taken there was yesterday.

Q. Did that result then in 2.2 yesterday? A. Yes, 2.2 above city datum.

THE COURT: When was that taken? A. Yesterday morning. I have had levels over the line before, but not continuous levels clear through, so I went there to see that there was no low ground lying between the ridge and the meander post—swales or lower ground than that point.

MR. DENT: Q. You can state whether there is ground that is higher, or high ground on the north line of sections 19 and 20 at that corner—whether there is a depression lowering the ground towards the lake? A. The land at the section corner is practically four feet above city datum. About 400 feet to the south of the section corner the ridge is 8.86 above city datum.

Q. Then describe the remainder of the line? A. Then it falls gradually from that clear to the fractional section corner. At 12 chains, or 12.50, which would be about 850 feet north of the meander corner, the elevation of the ground is 3.1 feet above city datum. That is the beginning of the low land from the foot of the ridge.

MR. BENNETT: What is it at the meander corner? A. 2.2 feet.

MR. DENT: It is not the meander corner, as I understand it? A. Well, it is the fractional section corner.

Q. The field notes speak of an outlet from the lake in section 30. I will read from the field notes: In running the meander line to the northeast quarter of section 30 the notes state, at a certain point, "the outlet of lake 40 links wide, a rapid current." Are you familiar with that part of the field notes? A. Yes, sir.

Q. Have you made any surveys with reference to that matter to determine what it would indicate as to the elevation of water at the time? A. Not by means of a level to put on the present opening; I have passed there a great many times and am thoroughly familiar with the neighborhood.

Q. What do you know about that outlet? A. That outlet is still in existence. What is called the natural outlet into Calumet River, from Wolf Lake into the Calumet River.

MR. BENNETT: Isn't it Hyde Lake?

THE COURT: Well, the navigable lake on the government survey? A. Yes, that is what I meant.

MR. DENT: Q. Suppose by the field notes that outlet to be forty links wide and to have a rapid current, what would that indicate as to the height of the water in the lake? A. It would indicate a pretty good height; that is, it would have to be more than an average height of the lake.

THE COURT: How wide did you say it was? A. Forty links wide.

MR. DENT: Q. What height or elevation would it, in your judgment, indicate? A. From three and a half to four feet, at the least calculation. The water would have to be of some depth in the channel in there to make a rapid current.

Q. How high would the water have to be to flow out of that channel? A. Well, I have not taken any levels in it, but I should judge that it would have to be—

MR. GOUDY: It is best not to give his inferences, if he don't know anything about it.

MR. DENT: I think he has a judgment in regard to it.

MR. GOUDY: His judgment ain't worth anything.

THE COURT: If he has taken no level it would be mere guesswork, anyhow.

MR. DENT: Q. Do you know about what the elevation is? A. Not from the level; I do not. I only know from observation.

Q. Could you give it approximately? A. I think I could.

Q. What would it be approximately?

Objected to.

THE COURT: We will admit it for what it is worth. A. I think about three feet.

MR. DENT: The field notes speak of a line commencing at the corner of sections 13 and 24, and running thence east between sections 18 and 19, stating that at 16.15 chains you enter a marsh which bears north and south. The next call is "40 chains raised a mound in which set a post for quarter section corner," and so forth, down to "marsh water 4 to 36 inches deep." What would that

indicate as to the height of water in the lake, as to the level? A. Well, I could not testify to that, because I never have taken levels on that line.

Q. Have you taken on that line anywhere or found levels on that line anywhere? A. Yes; at the corner of sections 18 and 19, as I testified a few moments ago, just on that corner alone.

Q. You can state whether that would indicate that the whole of that distance was through marsh, according to the field note.

Objected to.

Q. Marsh water from four to thirty-six inches deep?

THE COURT: What has that to do with this?

MR. DENT: I understand we can show that the water in the marsh could not be higher than the water in the lake. The witness can tell whether that would aid in determining whether that would indicate what was the water in the lake?

Objected to.

THE COURT: He can look at that and see what it indicates. It indicates four to thirty-six inches of water on that marsh.

MR. DENT: It would indicate the height of the water in the lake, from the configuration of the ground. This connects with the lake. Here is the marsh extending down into the lake. That does extend into the lake.

THE COURT: Do I understand that that marsh connects with the lake?

THE WITNESS: It does, in high water.

MR. BENNETT: Which side of the section line is that, east or west? A. It commences south.

Q. Which side of the north and south section line between 19 and 20? A. West of it.

Q. Towards the Calumet River—that is what I thought? A. Yes; it connects with it in two places in high water. It says four to thirty-six inches.

THE COURT: Let him answer that. A. It indicates high water.

MR. DENT: Q. How high, in your judgment? A. Well, from three to five feet. It has to be guessed at to a certain extent, because I never have taken my levels over the ground, although I am thoroughly familiar with the line.

THE COURT: You never have taken any levels over the ground? A. Not on this line, no, sir; I never have.

MR. DENT: Q. You are generally familiar with that ground? A. I am thoroughly familiar with that line.

MR. GREGORY: Three to five feet above? A. It might reach above five feet, but it certainly indicates more than three feet in depth, at least; I mean three feet above city datum—the thirty-six inches; I don't think there is a place on that line naturally, but does—

MR. GOUDY: You needn't tell what your belief is.

MR. DENT: Q. I read from the field notes showing surveys of

1834, and I now call attention to the field notes showing a survey March 5th, 1835, apparently a re-running of the meander of the northerly margin of the lake along fractional section 20. There are several calls given here. It says it goes to the state line between Indiana and Illinois, 60.25 chains south 155th mile corner, at said section. A. 158, is'nt it?

Q. 155th, it seems to be here. "Set post on corner to section centers," etc. Then further on it says: "Found the water here too deep to raise a mound." What would that indicate, if anything, as to the height of the water? Do you know about that point at that time?

Objected to.

THE COURT: It indicates what it says—too deep to raise a mound.

MR. DENT: Q. Well, anything more than that?

Objected to.

Q. Do you know that point? A. Yes, sir.

Q. How is it now as to elevation? A. You mean just at the present time, or in its natural condition?

Q. In a state of nature? A. The surface of the ground is from one to two feet above city datum.

Q. Then it would only require water from one to two feet in depth to submerge it? A. Yes. I think very near two feet.

THE COURT: What point is that? A That would be the connection with the State line or the east line of section 20, and the north line of Wolf Lake, on the State line.

MR. DENT: Q. Now, in the field notes of the survey of June 17, 1834, this meander line—the same meander line—the last call before reaching the point you have just mentioned is "two chains to the temporary post set by me on the line between Indiana and Illinois, at the intersection of said line with the lake. Land all marsh, water from six inches to three and a half feet deep." That would be at the same point, would it not, to which you have just called attention? A. The closing point there would be; yes.

Q. What would that show or indicate as to the height or elevation of water, with reference to city datum? How high would the water be?

Objected to by Mr. Douthart on the ground that these questions seem to be all based on the idea that city datum is the height of some water, whereas the lake varies from time to time.

THE COURT: These depths are all taken with reference to city datum?

THE WITNESS: Yes, sir.

MR. GOUDY: The point of these answers to these questions seems to be that city datum is the height of the water in Lake Michigan.

THE WITNESS: I have not intended to make any such answer.

MR. GOUDY: We object to the latter part of the question.

THE COURT: Let him answer.

A. On this line I cannot tell you. As I understand that note which says the water from the intersection of the State line with the lake, "Land all marsh, water from six inches to three and a half feet deep." Now, I don't understand from that that at its starting point it was six inches deep, and at its closing point on the State line it was three and a half feet deep. My understanding of that is that over this length of land, or the line that may have been traveled—the continuous length, he has found water in certain places that was three and a half feet in depth, and at other places, six inches. That water is from six inches to three and a half feet deep, it does not indicate at what points that water is. Now, I have not taken any levels nor followed that line through when the lake was not frozen. There may be points in the lake that are deeper than that for what I know, and consequently I cannot answer the question in any way or give any idea as to what it would indicate.

MR. DENT: Q. Are you able, however, from those notes, to give a judgment approximately as to the height of the water at the time? A. No, sir; not on this line at all. Not unless I simply connect it with other lines, and as they had found water a certain depth in there, why, at the same date the water of course would be a certain depth, and from that rule I come to the conclusion that the land was a certain height, but that is the only way I could reason it out at all, because there may be deeper places in there on that land which I don't know about at all.

THE COURT: What time was that? A. March, 1835.

MR. DENT: That was June, 1834, that I last called attention to—June 17, 1834; the other date was March, 1835.

* * * * *

Q. What would be the effect upon Elm Island at an elevation of the water in the lake of 4.4 feet? A. It would be entirely covered. The highest point that I could find on Elm Island was 4.2.

* * * * *

MR. DENT: What elevation of water would cover the space between Elm Island and the island on the north? A. To cover the great portion of it—that is, not extending clear to that portion, but extending about, say, one hundred feet to the south of the island, 2.2 would cover the surface of the ground; water 2.2 above city datum.

Q. At the lowest elevation of water, then, 2.2 feet, what space would be submerged between the points named? A. That would depend entirely upon—

Q. Are there some low places there? A. Yes; there are some low places there.

Q. How low? A. As low as one foot above city datum. There is one, one foot above city datum.

Q. How wide would the space be east and west if the waters were but one foot above city datum in that space? A. You would have to give me what line you would want I should give it on.

* * * * *

Q. You have observed this lake at various times, as I understand—have you seen it at various stages of water? A. Yes, sir.

MR. GREGORY: Which lake do you refer to?

MR. DENT: The lake of which I am speaking.

Q. Have you taken the levels or ascertained the elevation at different periods? A. Yes, sir.

Q. I wish you would look at this table, if you please, and see whether it shows the elevations which you have taken (handing same to witness). A. Yes, sir.

Q. Please state what you have ascertained with reference to the elevations of water? A. I have taken the heights of the water in the lake, and have shown them in the right hand column of this map. The left hand column shows the dates; that is, the month and day; the center column shows the year, and the right hand column shows the elevation above city datum that the water was in Wolf Lake at that time.

(Said table is herein inserted, marked Rossiter's Elevations of Wolf Lake.)

ROSSITER'S ELEVATIONS OF WOLF LAKE.

MONTH.	DATE.	YEAR.	FEET ABOVE CITY DATUM.	
January	21	1875	1.33	
February	6	"	1.33	
March	23	"	1.33	
January	3	1876	2.58	
"	14	"	2.58	
"	21	"	2.66	
"	25	"	2.75	
February	9	"	3.05	
"	10	"	2.99	} Opened Wolf River. Lake } Michigan elevation, 1.14.
"	15	"	2.58	Wolf River open.
"	19	"	1.99	Wolf River open.
"	26	"	1.66	Lake Michigan running in.
March	10	"	1.60	
"	14	"	1.79	
April	22	"	2.87	
"	26	"	2.91	
June	16	"	3.04	
"	20	"	3.16	
"	21	"	3.16	
July	8	"	3.33	Opened Wolf River into Lake Michigan.
September	16	"	3.12	
November	11	"	2.99	
January	11	1877	2.75	
"	26	"	2.87	
February	14	"	3.16	
May	28	"	2.63	
September	5	1878	2.74	
October	9	"	2.04	
November	25	"	2.28	
December	4	"	2.23	
"	5	"	2.33	
February	26	1883	3.43	
March	2	"	3.93	
October	16	"	2.20	
April	27	1885	2.51	
July	12	"	2.35	
June	12	1888	2.21	
July	12	"	2.21	

Average elevation—2.52.

Q. How did you happen to take those elevations? A. I was connected with a lawsuit for Mr. Forsyth, and the most of them—the first part, during 1875 and 1876, and perhaps extending into 1877, were taken for the purpose of averaging or knowing the condition of the water in those lakes for his suit.

Q. That was Jocob Forsyth? A. Jacob Forsyth; yes, sir.

Q. And after that time, how did it happen? A. Since then I think I have only taken them when I wished to use them for leveling purposes. Before that time, that is, during the time of Mr. Forsyth's suit, I took the elevation of the lake every time that I went there.

Q. What has caused the fluctuations in the lake, within your observation? A. The rise in the water when the mouth of Wolf River is closed, is caused by rains and snow drained from the lands south and slightly west, and to the east for some seven or eight miles.

THE COURT: Q. Surface drainage, you mean? A. Yes, surface drainage. The low waters are caused by the opening of the lake into Lake Michigan.

MR. DENT: Q. Opening of the bar? A. Yes, sir; the waters running out into Lake Michigan, during a term of low water in Lake Michigan.

THE COURT: That would be when Wolf River would be open? A. Yes, sir. That would be when Wolf River would be open.

MR. DENT: Q. Then, with reference to the western part as to the connection with the Calumet River, what effect has Lake Michigan? A. Well, in extremely high water, the waters would back up through the Calumet River into the lake, that is, extremely high water in Lake Michigan, remaining so for some length of time, and would back up in the Calumet River and overflow at the natural channel into those lakes. That would affect it as well.

Q. Can you state whether the waters from the lake would run in over the marshes at any time? A. Well, I think that there are only one or two connections that the water would run over into that river, except in section 29, there is a large marsh running in from the south of the lake.

Q. That is section 31, isn't it? A. I mean section 31, but I never have followed that continuously out to its southern end, so I don't know whether it would be anything more than just purely surface water adjoining the marsh or not.

THE COURT: Q. Two places, you say? A. Yes, sir; there are two places, one of them would be in section 31, which is called the natural outlet, and the other, in high water, would be in section 19.

MR. DENT: Q. Have you observed those fluctuations to occur suddenly or quickly at any time? A. The fall of the water often occurs very quickly, within two or three days; when the mouth of Wolf River is open the water is very high. It will run out in the course of two or three or four days.

Q. What is regarded as low water in Lake Michigan? A. One foot below city datum.

Q. How high is the bottom of Hyde Lake as it is now called with reference to city datum? About what is the average level of the bottom? A. Well, I will have to make an estimate of it; I have never made a calculation of the average height.

Q. I thought perhaps you knew. A. No, sir.

Q. Whether the bottom is below city datum or higher? A. Well, you asked for an average height. The lowest point is one foot below the city datum.

THE COURT: That is the lowest point of what? A. The lowest point of Hyde Lake would be lower than one foot below city datum.

Q. You mean the lowest point of the bed of the lake? Yes, sir.

MR. DENT: Q. And that would be represented by little ponds? A. Yes, sir; small ponds, five in number, in the western part of the lake, represent water in Hyde Lake one foot below city datum.

Q. What is high water in Lake Michigan? What would be regarded as such? A. Five feet is regarded high water.

Q. Five feet above datum? A. Five feet above city datum.

Q. The high water period would have some ranges, wouldn't it, below some lower elevations? A. Yes, sir.

Q. From what point to what point would be regarded as— A. Well, from three to five feet is considered a high stage of water in Lake Michigan.

Q. Have you observed whether those stages change periodically, long periods or otherwise? A. Yes, sir; they do.

Q. How long are the periods, usually? A. Well, I don't know that it is regular, only that perhaps for a term of years, two or three, or four or five, or it may reach up to more than that, the water may be high, and then for a term of years, perhaps correspondingly long, the water will be low. Then I think that some years, it would be low, and perhaps the succeeding year would be middling high. It might not be extremely high and extremely low one year following another.

Q. Do you know which is the longer, the high water, or the low water periods? A. Taking the whole length of time that record has been kept, I don't know which is the longest.

Q. About what would be the average of such a period as say thirty years in Lake Michigan, from your observation and knowledge? A. We consider it from 2 to 2.2 above city datum.

MR. DOUTHART: I object to this. If this witness has any knowledge other than the record kept by the city, he should state so. If he gets his knowledge from the record kept by the city, we need no information on that.

THE COURT: You can find out what he is testifying from. I suppose he is testifying from his own knowledge.

MR. DOUTHART: It is a question whether he has kept these measurements or not.

THE WITNESS: I have not.

MR DOUTHART: If this is all in the city records, that is the best evidence.

THE COURT: I do not know that they are there. Go on, Mr. Dent.

MR. DENT: Q. What effect have strong north and east winds upon the elevation of water in this lake? A. Raises the water here.

Q. What effect have winds in the south and west? A. Lowers the water in Chicago and vicinity.

Q. Have you observed what has been a cause for a division between the two lakes now known as Wolf Lake and Hyde Lake? What tendencies there have been towards causing a separation? A. Yes, sir.

Q. What have you observed in reference to that? A. Low water is the only thing that would make the separation.

THE COURT: Make what separation?

A. Between the two lakes.

MR. DENT: Q. How would the low waters tend to cause the separation? A. When the water is at 2.5 it is one lake; that is, the water is continuous between the two lakes. If it becomes two feet, then there is a divide between them. If it is only one foot above city datum, then there is a still larger divide.

Q. Well, suppose the water to fall from 2.5 to a point which leaves the land unsubmerged, what effect has that in reference to making an elevation? A. Well, there would be decayed vegetation to a great extent upon that ground. If the land is dry at some times, as it has been, the wild rice would die and settle upon the ground, and form land in the end.

Q. What effect would the washing of the water from one side to the other, with the point of land extending from the north into the lake, and from the south into the lake—what effect would the water have? A. That would also help to build the ridges up and make a divide there.

Q. You can state whether you have seen the waters in this lake higher than those in Lake Michigan, and if so, how much higher? A. I have seen them higher in Lake Michigan.

Q. Higher than in Lake Michigan? A. Higher than Lake Michigan, but I cannot tell without referring to some data.

* * * * *

Cross-Examination by MR. GREGORY.

Q. Mr. Rossiter, how long have you been acquainted with this region of country—I don't know but you stated it once—of which you have made these maps—when did you first know that region of country? A. Well, before the fire. I have been very well acquainted with it since 1875.

Q. You said you made some levels of water in some lake there with reference to some litigation that Jacob Forsyth had, I believe? A. Yes, sir.

Q. What property was involved in that controversy? A. All

of the property adjoining on the east of Wolf Lake in the State of Indiana; and all of the property adjoining Lake George, except lots 1 and 2 in section 18 east of Lake George.

Q. When you first saw this locality how did you come to see it; did you go down there on special business? A. Surveys.

Q. What time of year was it, if you remember? A. I cannot tell the first time of the year—I cannot tell you the first time I was there.

Q. You remember about when it was? You say before the fire? A. I think it was just before the fire. It was not a great while before the fire.

Q. At that time what was the body of water west of the strip of land on which the South Chicago and Southern Railroad was built, known as? A. Well, I don't know what it was known as down there, except what I have heard testified to here, but in Chicago it was known as Wolf Lake. The western part of that lake in Chicago was only known as Wolf Lake at that time. It might have been known as Hyde Lake down in that vicinity by hunters or persons that lived upon it; that I don't know.

Q. Did you hear Mr. Waite's testimony? A. A portion of it.

Q. Did you hear his testimony to the effect that it had always been known as Hyde Lake? A. Yes, sir.

Q. So far as he had known it? But that was not your understanding? A. It certainly was not generally known as Hyde Lake here in Chicago for from five to ten years.

THE COURT: Q. Five to ten years what? A. After the fire.

MR. GREGORY: Q. When you first saw the lake was there a strip of land between what is now called Hyde Lake and Wolf Lake? A. I don't know. I can't remember.

Q. You have no recollection? A. No, sir. My surveys did not take me onto that strip of land.

Q. Where did you survey there at the time you saw that? A. For the first time that I took notes of it it was in section 32 adjoining the state line south of the lake.

Q. When was that? A. Well, in 1871 or 1872, immediately after the fire; that is, whether it was in the fall, after October, after the fire in October, or the next spring, I have forgotten.

Q. What is the lowest level of water in either Wolf Lake or Hyde Lake which you have ever noted personally? A. Two inches below city datum.

Q. Two inches below city datum? A. Yes, sir.

Q. When was that? A. Yesterday and last Saturday.

Q. Then yesterday and last Saturday you took a level—in which one of those lakes? A. Hyde Lake.

Q. You took a level in Hyde Lake yesterday and last Saturday, and the level was two inches below city datum; and that you say is the lowest point you have ever known the water to stand at? A. Yes, sir. You did not ask me, though, as to Wolf Lake, I believe—the elevation.

Q. I asked you in which of the lakes? A. Hyde Lake.

Q. Did you at the same time take a level in Wolf Lake? A. Yes, sir.

Q. What was it? A. I think it was 3.28 inches above city datum.

Q. About three inches above? A. Three inches above city datum; the other one, two inches below.

Q. Making a difference of about five inches in the height of Wolf Lake above Hyde Lake? A. Above Hyde Lake, yes, sir.

Q. Do you know what that is due to at present? A. Yes, sir.

Q. What is it? A. To a dam across the canal just south of Elm Island.

Q. Have you in taking these levels noticed whether the water of Lake Michigan is above or below, as a usual thing, the water of Wolf Lake and Hyde Lake? A. I cannot tell you except as to those levels on that profile. That is the only time I have ever tested it, and I think the only time I have ever made a close examination of it

Q. As to those it appears, I believe, in a general way, by those levels, that the water in Wolf Lake is generally higher than the water in Lake Michigan? A. Well, I think so.

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Q. Have you ever seen Wolf and Hyde lakes when the water was 2.5 above datum? A. I have seen it 2.35, but without referring to my notes, I can't tell you—that is, near the ridge—I have seen the lakes at—a certain portion of the lake at 3.71 above city datum.

Q. That is the highest you have seen, I believe, is it not? A. I think it is.

Q. Was there any occasion for that high water at that time, do you know? A. It is the opening up of the spring season. I don't know of anything, only it is a natural occasion for it.

Q. What year was that? A. 1883.

Q. Were you down there at that time on the strip of land between Hyde and Wolf Lakes? A. At what elevation?

Q. At the time you took the elevation of 3.71? A. No, sir.

Q. Were you on the strip of land there? A. No, sir.

Q. Where were you? A. That was taken at the mouth of Wolf River.

Q. That was taken at the mouth of Wolf River? A. Yes, str.

Q. It was the elevation of the water there? A. Yes, sir.

Q. Was there any opening between Hyde Lake and Wolf Lake at that time? A. No, sir.

Q. There was no inlet open between Hyde Lake and Wolk Lake at that time?

THE COURT: In 1883?

A. Well, I was not on the ground.

Q. Was there ice on the lake then when that was taken? A. It was taken March 2, 1883.

Q. Was the lake frozen? A. I can't remember; I think not.

Q. Was the level taken of the water or not at that time? A. Always taken of the water. I took it several times. I cut through the ice and brought the water to the surface.

Q. So that was not the level of the water in Wolf Lake or Hyde Lake, but the level of the water in Wolf River right near the mouth, was it? A. That is where it was taken; yes, sir.

Q. You say that there was no communication then between Wolf River and the lake? A. Lake Michigan? No, sir; there was none.

Q. Have you ever been down there when there has been any? A. Yes, sir.

Q. When? More than once? A. Yes, sir; a good many different times. My profile shows one time.

THE COURT: Q. February 26, 1876? A. Wolf River was open at that time, but I had seen it several times since.

MR. GREGORY: Q. It is generally closed, is it not? A. Yes, sir; it is.

Q. Now I will ask you to state where those levels were taken there? You say this one was taken in Wolf River; were any of them taken in Wolf Lake or Hyde Lake? A. I think that none of those levels were taken in any other place but at the mouth of Wolf River.

Q. But at the mouth of Wolf River? A. Yes, sir.

* * * * *

MR. GREGORY: Q. At that time did there seem to be any current in Wolf River? A. Yes, sir; there was a strong current in Wolf River, running three miles an hour or thereabout.

Q. Where was it running to? A. Running from Lake Michigan into Wolf River.

Q. When the lake was open? A. It was open at that time.

Q. At what time? A. The time I testified; in February, the 26th.

Q. Oh, yes; I understood you to say you took all these levels at the mouth of Wolf River? A. Yes, sir.

Q. I understood you to say that most of the time the mouth of Wolf River was closed? A. Yes, sir.

Q. So that at that time there would be no current? A. No current at all then.

Q. But you assume that the level of the water there would be the same that it would be in both Wolf Lake and Hyde Lake? A. Yes, sir.

Q. Have you ever been on this strip of land between the two lakes? A. Hyde Lake and Wolf Lake?

Q. Yes, sir. A. A great many times.

Q. Have you ever been on that strip of land when it appeared to be covered by water? A. Very nearly. I have been there when the water was 2.35.

Q. Where did the water cross that strip at that time? A. It was a'most entirely covered.

Q. The strip was almost entirely submerged? A. Yes, sir.

THE COURT: When was that? A. That was July 8th, 1885.

* * * * *

Q. What I refer to now, Mr. Rossiter, is not what your opinion would be as to what it would be, but when you have seen the ridge. You say you have been there many times; how recently, aside from this last week? A. Been down there this summer.

Q. This summer? A. Yes, sir.

Q. This last summer? A. Yes, sir.

Q. And the summer before? A. Yes, sir. During 1889 and 1890, and some in 1888, I presume I have been there ten or twelve or fifteen times a year, maybe more than that.

Q. Have you ever, in that time, since 1888, seen the ridge nearly submerged, as you express it? A. No, sir.

Q. Not within the last three years? A. No, sir.

Q. There has been, during that period of time, a considerable breadth of land, has there not, all the way down from Smale's, down to the old Reese place? A. Whenever I have been there it has.

Q. For the last three years? A. Yes, sir.

Q. How about the two years preceeding? A. Well, in 1885—

Q. Take us back to 1887 or 1886; since 1886; I believe that was the highest water it ever had in Lake Michigan, was it? A. I don't know, I am sure.

Q. It was, practically. Since 1886, have you ever seen that ridge submerged? A. I hardly think I have, but I would not say positive, but my impression is I have not, since 1886. I think, in 1885, I saw it submerged, and two or three times before that.

Q. I guess it must have in 1886; upon that, you say you don't know? A. You can easily tell.

Q. That was when the water was high? A. At the time of the suit before Judge Gresham—I was there during the suit.

Q. What effect has the deepening of the Calumet River had—the improvement of the navigation of that river on this? A. I don't know that the deepening of the Calumet River has has any direct effect upon this land, upon this lake or this territory. It might have a direct effect as giving it a little bit freer way of carrying the water off. The channel into Hyde Lake from the Calumet River has made the greatest difference.

Q. The cutting of that channel from Hyde Lake into the Calumet? A. Yes, sir.

Q. What effect has that had? A. That makes the water lower, has a tendency to make the water lower in the lake. It causes it to change quicker—either rises quicker or lowers quicker, as the case may be.

Q. It would rise quicker when the water sets back through the Calumet from Lake Michigan? A. Yes, sir.

Q. Do you know who cut that channel? A. I don't know of my own personal knowledge. I know from hearsay.

Q. Cut across the land of Mr. Rand, I believe, on the north, there? A. Yes, sir.

Q. Have you any way of getting at the average height of the water for the last ten years in these lakes? A. No, sir; I have not.

Q. I will ask you to state whether or not the water has averaged lower the last five years—the last ten years—than it has prior to that time, if you know anything about it? A. Well, a portion of my notes were taken previous to ten years ago.

Q. These were very fragmentary, from 1878, but could you give us the average stage of water from 1878 down to 1888, from an inspection of that (handing paper to witness)—could you do it readily? A. Well, it would not vary very much in the total average through the whole term.

Q. That would be due to the high water of one year, wouldn't it? A. I don't know, because I don't know the year—that there is any year in this term that it was high. There is one single elevation that gives 3.71 on March 2nd, 1883. There is one other elevation which gives 3.51, and that would be in 1883 also; but whether that was a high stage of water during the whole year or not I don't know.

Q. But your general opinion is, or, so far as you know, at least, in the last five years there has been a strip of land extending between those lakes, making, in effect, two bodies of water—Wolf Lake and Hyde Lake—connected by this channel, and that the tendency has been of late years for the level of the water in those lakes to fall, the water to recede from the land somewhat? A. Yes, sir.

Whereupon the further hearing of said cause was adjoined until 10 A. M., Tuesday, December 1, 1891.

December 1, 1891, A. M.

Court met pursuant to adjournment at 10 o'clock A. M. Cross-examination of the witness ROSSITER continued by MR GREGORY.

* * * * *

Q. Why do you call this strip down here, which we have called for convenience McDaid's Point—why did you call than an island? A. Because it would be an island with water at that height.

Q. It would be an island? A. Yes, sir.

Q. Then there was a channel running which way just north of that? A. Immediately north of that would be a strip about one hundred feet wide, and then would appear another little small strip of land, which under the same circumstances would also be an island.

Q. What were the elevations of the bed north of there; were they such that they would be covered with water—that there would be any inlet through here, except by the railroad, at 2.5? You

have shown water between the point south of Smale's house and the north projection, which you name "Island." You have shown a kind of a north and south connection? A. Yes; that would, in its natural state, be less than 2.5 feet. I have got the elevations exactly, for the height of that, taken two weeks ago.

Q. Well, the long and the short of this whole business is, Mr. Rossiter, that in the present condition of things there, there is continuous land from about the center of section 20, clear down to the south line of 29, between these two lakes, except where this cut is, which at an average state of water is permanently above water, is there not? A. An average state of water? I should want to qualify it a little. At two feet it would be above water.

Q. Well, at 2.5 the water would not be above it? A. The water would be over a portion of it to-day.

Q. I thought you said it would not? A. When?

Q. Just a little while ago you said that the artificial obstructions would prevent it going over the railroad? A. Well, the artificial obstructions would prevent it going over the railroad, except—

Q. It would not get to the wagon road at two and a half feet? A. Yes, it would get over a good portion of that at two and a half.

Q. Where? A. From Elm Island, extending about 600 feet at the present time, the water at 2.5 would not be over the road, but north of that up to some distance; a distance of 300 or 400 feet the water at 2.5 would stand across at its present condition.

* * * * *

Q. Have you ever been on this strip or seen it when the water was two and a half feet above city datum? A. I was making an explanation; I was going to say I was there, but I did not take the elevation of the water.

* * * * *

Q. What I ask you now is whether you have ever seen that piece of ground, the land so delineated there, with the water at 2.5 above City datum? A. I have, practically, because my notes call for 2.35, or else 2.33, something of that kind. That was the time during Judge Gresham's Court; I went there to examine it for that purpose, and the water at that time was almost 2.5, maybe 2.43; I don't remember now. I can tell by referring to my books.

Q. When was that? A. That was the time when this case was tried before Judge Gresham.

Q. Do you remember what season of the year? A. I can tell by looking at my books.

Q. Yes, refer to it, if you can readily, and refer to your notes as to the level of the water? A. In book 30, page 99. It was July 18, 1885. The elevation was 2.35.

* * * * *

Q. That is to say, there was water over the land then at 2.35? A. Yes, there was.

Q. Where did you take that elevation or level? A. That level was taken at Wolf River bridge.

Q. Were you down there when Judge Gresham and the counsel in the case were? A. No, sir; I was not; that was three or four days after I was there.

Q. How deep was the water just north of Elm Island? A. Well, it varied in places. There was through that low place there, which is shown, and I have testified to it as probably a natural channel; it was about a foot deep or more.

Q. Was there any other communication of water between the two lakes at that time? A. Yes, the artificial channel was open at that time.

Q. Well, north of that, was there any north of Elm Island; was there any flow of water; was there any covering of the ridge or strip? A. I am not sure whether I was at the point just south of that—the southern point—or to the south end of the ridge that Smale was on or not. My impression is that I crossed there and there was water running through there at that time.

Q. Was there any water running through between Elm Island and McDaid's Point? A. There was water all through that ground there.

Q. Standing water, but it was not running there, was it? A. No, sir; it was not running.

The court took recess until 2 o'clock P. M.

Tuesday, December 1, 1891, 2 o'clock P. M.

Court met pursuant to adjournment, whereupon F. C. ROSSITER was cross-examined by MR. BENNETT, and testified as follows:

Q. When did you commence the practice of surveying? A. I came here in 1867, April 16th, and commenced work with Wolcott & Fox.

Q. That was the first surveying you ever did? A. Yes, sir.

Q. Had you taken any course in surveying before that? A. Not direct.

Q. And never have since? A. No, sir.

Q. All you have learned has been in the office of practical surveyors since 1867? A. No, sir.

Q. Well, how was it? A. I took some drawing in Vanderneillen's School of Engineering one winter here in Chicago.

Q. What year was that? A. I can't tell you. I think about three years after I came here.

Q. You never took a course in civil engineering? A. Never took a course in civil engineering.

Q. You don't profess to be a civil engineer, do you? A. To a certain extent I do. I don't practice the business. I follow the business of surveying to the greatest extent. I advertise as a surveyor and civil engineer, but I am attending to all of the Union Stock Yards and Transit Company's engineering.

Q. I am not asking what you are doing. A. Well, I consider myself a civil engineer.

* * * * *

Q. You have undertaken to swear in this case that in 1834 and 1835, when this survey was made of Hyde Lake, the water was 5 5 above datum, have you? A. I swore to certain things, that if the facts would bring it out.

Q. That is the way you state it now? A. That is the way I stated it then.

Q. You assumed in your problem that the government notes, in the first place, were true and correct, didn't you? A. The government notes were read and I took them as they were read.

Q. You assumed that they were true? A. I don't know as I made any assumption about it at all. I simply took them as they were read.

Q. What do you mean by that? A. They were read here and stated that the water was so deep, and I simply, if you like, assumed them to be true—if you like it.

Q. You assumed also that it was true that there had been no change in the ground on the section line between sections 19 and 20 where you made your final tests, didn't you? A. I did not make any assumption about that at all. I told what the ground was at the present day, and made a statement that the two elevations together would make a certain elevation five feet and some hundredths or some tenths.

Q. Then you do not undertake to say that the ground along the section line between 19 and 20 referred to in the notes, and on which you predicate your computation, was the same in 1834 and '5 as it is now? A. No, sir; I do not pretend to say anything about it at all, or did not.

Q. You could not assume that it was within two feet or two feet and a half now of what it was then, could you? A. Well, that is a thing that I could not tell.

Q. Could not tell anything about that? A. No, sir.

Q. Now, there are four instances, I think, where you cite the field notes to sustain you in your position as to the elevation of the water then. One was at the outlet, wasn't it, at the west of Hyde Lake? A. Well, not to sustain the position that the water was at five feet and certain tenths over.

Q. No, you stated as your opinion from that that it was three and a half feet? A. Or more; yes, sir.

Q. Or more? A. Yes, sir.

Q. Now, you necessarily assumed in your estimate—you judged by the width of the stream at the outlet, didn't you? A. Partly.

Q. And the depth? A. Yes, sir.

Q. You necessarily assumed, didn't you, that it was in the same condition then that it was in 1835 when the surveyor run the line over it? A. Not in that condition; well, I think that there is

not as much chance in that outlet of any change as there is in the other ground.

Q. I did not ask you that. A. Well, the assumption would be upon that ground.

Q. About the same? A. About the same; yes, sir.

Q. Why do you say "about the same"? You was not there in 1835? A. No, sir.

Q. What was your assumption about it? A. About the same as it was in 1835.

Q. You did not make any allowance for that road which is shown by the evidence to have been made at that point—gravel and sand hauled in there to make a road? A. I did not know any such fact as that when I first went there, and I do not take it into consideration in my testimony.

Q. When did you go to look at the width of that stream to come to your conclusion? A. The dates I cannot tell you. I passed over there a great many times.

Q. I do not ask you for a day. I ask you for a year. What year was it? A. Well, since 1871, but what years I cannot tell.

Q. I want the time when you went there to make this measurement, in your own judgment. A. I cannot tell you.

Q. Cannot tell it? A. No, sir.

Q. Was Mr. Hardin with you? A. No, sir.

Q. Don't you know from the government notes that there is a mistake of ten chains right at that point? A. In what respect?

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Mr. BENNETT: Q. In running the line from the fractional section corner, which is situated on the section line between 30 and 31, of the west fraction of the southeast quarter of section 30 northerly, don't you know that the course which ends at this outlet from Hyde Lake to Chittenden Bridge, or the Calumet River, is an error of ten chains either too long or too short? A. Thereabouts, I think.

Q. There is an error there that much? A. Yes, sir; I think there is.

Q. And you have always known it? A. No, I have not always known it.

Q. Since you knew the field notes? A. When I ran the meander lines I discovered it.

Q. How then could you predicate a judgment upon the field notes, not knowing what change had taken place at the outlet from 1835 to the time you were there? A. The outlet is there now, and I assume it to be the same outlet that was there in 1835—good evidences of it that it is.

Q. You assume it. Why do you assume it? A. There is no other place there that would show a natural outlet in the lines of the western bank of Hyde Lake in section 30 but at that one single place, and that is plain to be seen.

Q. Then the only elements that you predicate your judgment upon, you assume. You don't know whether they are true or not?

A. I don't know anything about what the condition of that ground was in 1835.

Q. Then I believe you do not rely on your estimate at all as to the height of the water at the time the line was run? A. Well, the notes show the water was running out of there, and a strong current, or something about it.

Q. That don't say running out of there. A. Well, it says strong current.

Q. Don't you know that if the water was running in across from the forks by reason of an ice gorge, or by reason of a flood coming from Blue Island, that the waters would necessarily be lower than outside? A. You had better read the notes and let me know just what they are, and then I can answer intelligently on that point.

Q. You are testifying on this subject. A. Well, I can't remember everything that there is.

THE COURT: Give him the expression.

THE WITNESS: Give me the expression and I can answer it.

MR. BENNETT: After running four courses, it says "to the outlet of a lake forty links wide, and rapid current." That is all it says.

THE COURT: Outlet of the lake?

MR. BENNETT: "Thence from said corner to fractional section 30 and 31 along the southwest margin of lake, along fractional section 30, township 37 north, range 15, east of the third principal meridian," and following the meander line—then the language is, "To the outlet of a lake forty links wide and rapid current."

A. If the water was not running out it would be an inlet instead of an outlet. If the water was running in the government surveyor would have said inlet. He says "outlet."

Q. Do you swear that that never is an inlet? A. No. I know that it is.

Q. Haven't you seen it an inlet? A. I have.

Q. Haven't you seen it run a rapid current into the lake? A. Well, I cannot tell you as to that. I know I have seen it. It might be an outlet or inlet, and I know it can be, and often is, and I have seen the water at some depth in it, but at this moment I cannot tell you which way it is running. It is an outlet.

Q. You have stated already that this slough which runs up to Chittenden Bridge takes a turn and runs southwesterly to the forks? A. No; southeasterly.

Q. Well, southeasterly to the forks of Calumet River. Don't you know that in high water the waters flow from the forks through very near this outlet and run into Hyde Lake? A. Oh, yes; certainly.

Q. You say that about your second survey in Hyde Park was on the half section line of 19, east and west line? A. One of my surveys was?

Q. One of your early surveys? A. The second survey that I have got notes of now.

Q. What piece were you surveying there? A piece on the

northeast of 19, you said? A. I was surveying, I think, a fifteen or twenty acre tract at the—the description called for a tract of land lying at the southeast corner of the northeast quarter, and extending west far enough to cover the description of the property.

Q. You were surveying that piece? A. Yes, sir.

Q. And not the Indian Ridge piece which lies right west of it? A. A portion of this description covered the Indian Ridge, but the great majority of it was described as lying in Hyde Lake.

Q. No, not that. A. Yes, sir; that.

Q. Was not the description by metes and bounds commencing at the southeast corner of the tract? A. Which tract?

Q. Of the tract you surveyed? A. Well, you cannot commence a piece of property at the southeast corner of its own tract?

Q. What? A. The southeast corner of its own tract. You said it commenced at the southeast corner of the tract of land I surveyed. That would not be any description at all.

Q. The southeast corner then of the quarter, if you please? A. It commenced at the southeast corner of the northeast quarter of section 19, as a whole section, not as a fractional section, taking it into Hyde Lake.

Q. And you attempted then to find where the corner ofthe four quarters would be if the lines were extended. A. That is what I went down there to do.

Q. The question was whether the corner was the intersecttion of the meander line or was the corner of the full section if extended before a survey was made by the government? A. There was no such question with me at all. The man that ordered me to survey told me to go there and commence at the quarter corner of the section, in the lake.

Q. You say, Mr. Rossiter, that the man told you to commece in the lake? A. He did, and he gave me the description that called for that piece of property.

Q. He gave you the description of the property? A. Gave me the description of the property and he talked on that very question.

Q. According to his deeds, didn't he? A. He didn't bring the deed.

Q. Who was the man? A. I think the man was Michael Traver. I can send for the book, and give you the exact description if you wish.

Q. You attempted to establish what would be the corner of the four quarters. You say the water was very deep? A. Yes, sir.

Q. You found it very miry, didn't you? A. I didn't get into it at all; the water was so deep I could not.

Q. You could not follow that half section line over towards Calumet River, could you, beyond the bridge? A. No, sir.

Q. It was all about alike over there? A. After west of Indian Ridge it was all covered with water.

Q. You went in far enough to find it was covered with muck east of the ridge? A. Yes, sir.

Q. Did you go out as far as the section corner would be? A. No, sir; I did not; I did not even go to the meander corner.

Q. You found it was extended northeasterly up along the ridge, didn't you? A. I did not examine northeasterly at all.

Q. You did not then? A. No, sir.

* * * * *

Q. I have asked you the west meander line of the tract known as the Dewitt tract on that map. In that case hasn't there always been water since you have known it? A. That is a thing I don't know.

Q. You don't know that there has always been water since you have known it? A. I think that when I was down there a week ago Saturday that the was no water on that point, and still at the same time I would not swear positively.

Q. That was the only time, if there was any time, that you did not see any water there since you have known it? A. Yes, sir; that is the only time. I have not always been there, but that would be the only time—

Q. You have run this meander once or twice, haven't you? A. Yes, sir.

Q. You always found water there? A. Whenever I have run it I have, because I have always run it on the ice—that meander line.

Q. Don't you know that since you have known it the deepest water on all of these courses was there? A. No, I do not, and still it may be there. I don't want to be misunderstood. It may be there. I don't know it.

Q. You don't claim that the language of the survey of 1835, "I found the water here too deep to raise a mound," is of any significance in this matter? A. Will you please read that so we will all know?

Q. What do you want Mr. Hardin to know for? A. I wish to know myself. I wish to answer the question.

(Last question read.)

A. That question I don't quite understand as it is.

Q. From your statement you cannot make any computation as to the height of the water in 1835, can you? A. Please read it over again, because I got a little confused on this point. I think the first time you read you read in reference to the general line of the water at a certain depth, and then another one that was on the state line. Those two I have got in my mind.

Q. Confine yourself now to the last and tell me if from that alone you can make any sort of mathematical estimate of the height of water in 1835, as to datum? A. Read that statement last.

Q. Just the last language? A. Whatever question you want I should answer, just give the language.

Q. "I found the water here too deep to raise a mound." You

cannot make any relia ble estimate as to the height of the water above datum at that time?

MR. DENT: He is reading from the field notes of the survey of 1834. A. Yes, that is on the state line, and you can hardly make an estimate of that. I know what the ground is, from one to two feet in height, but beyond that I don't know whether the water was three feet or three inches above it.

MR. BENNETT: I understand from your direct examination you abandon this part of the field notes as giving you any reliable basis to determine that the water was five feet? A. I abandon it entirely, either on this estimate you have just asked me or the one before.

Q. Then the reason you gave was that the line seemed to be from six inches to three and one-half feet and would not show where the lowest point was? A. That was the point exactly. I don't know whether I explained that or not. It might be at this very point.

Q. This language would imply that there was water over the whole ground, wouldn't it? A. No, sir; I don't think it would.

Q. These final remarks about courses relate to the whole ground that was run over after leaving the quarter section corner? A. The final notes I think do relate to it. I think it speaks of what the ground is, if I am not mistaken, and then stating water so deep. The water itself, I would not consider that that had reference to the whole ground.

Q. The note is six inches to three and one-half feet. Does the language imply that there was no less than that? A. No, sir; I don't think so, because then it would cross the ridge water six inches deep.

Q. Well, you see that, do you? A. Yes, sir; I have always seen it.

Q. Isn't it possible that these notes are not true? A. We understand that he finds water along on the line, and that it varies from six inches to three and one-half feet, or whatever the distance was, in depth.

Q. If, now, the proper construction of the language of these field notes would be that there is water at least six inches anywhere along this line in these different courses, the notes would not be true, so far as the ridge is concerned, would they? A. Well, now, I was not there at that time, and if the water was six inches deep over that—

Q. I am not asking your knowledge except as an expert? A. Yes, sir.

Q. Answer the question? A. If you take the notes literally.

Q. Hold on. (Question read.) A. I consider them true.

Q. They would then be true? A. I do not read the notes literally, as it says six inches above—that there was no water on the line less than six inches. If it was, the ridge was all covered, and I don't know but it was.

Q. I am making the assumption. That would be the assump-

tion that might be the construction of this language. I ask you if it was so considered, that the notes are not true with reference to that ridge? A. If the statement is literally correct it is not true, or at least I should judge so, although I was not there. If it is so, then the ridge was entirely covered with water, and six inches deep.

Q. If it was so this would be the second error we have found in the field notes upon which you predicate your evidence? A. Probably; yes, sir.

* * * * *

Q. Well, now, there is one more test you have given here, and you rely on that, I believe, almost entirely. That is, your measurements on the section line of sections 19 and 20? A. Well, I testify just to what I found there exactly, and what the government notes state.

Q. You have been there once, haven't you, for that purpose? A. I have not been there direct but once for that purpose, although I have been there a good many different times.

Q. Were you there with Mr. Hardin? A. On that line?

Q. Yes, sir. A. No, sir.

Q You say that the section corner of 19 and 20 is some four feet above datum? A. Yes, sir.

* * * * *

Q. Then in running south you crossed the ridge at an elevation of about eight feet? A. Somewhere about there; yes, sir.

Q. And going a little further you come down into the lower ground? A. Yes, sir.

Q. The lower ground is all about level? A. Pretty nearly level.

Q. It is all this slough ground, isn't it? A. After you once enter into it, it is.

Q. It is about as low there as it is anywhere, right at the foot of the ridge? A. It is very closely; yes, sir.

Q. All the way down the muck is a foot or more deep? A. I should think it was.

Q. And then below that is quicksand, isn't it. A. Well, it is of the same nature that the sand is around there. I don't know that it is quicksand. I hardly think it is what you would term quicksand, and still it may be. At the same time it is very solid. In fact, I don't know anything about the soil. I suppose it to be sand, that is all.

Q. You run over this line, you say, the other day? A. Yes, sir.

Q. Where did you take this level? Two feet and how much? A. 2.2.

Q. Where was the point? A. One of the points was right at the meander post, and then I took elevations every fifty feet through until I struck the foot of the ridge.

Q. That was a dead level, wasn't it? A. No, sir; it was not quite. It raised, perhaps, three or four tenths on the muck.

Q. There was heavy grass there, wasn't there? A. Yes, sir.

Q. This heavy swale grass? A. Yes, sir.

Q. And it is always grown over? A. Well, ever since I have known it.

Q. You said in testifying in reference to the land between Wolf and Hyde lakes that on certain of it you thought there was quite an accumulation from the decay of vegetation these long years? A. Yes, sir.

Q. Wouldn't that be just as true above as it would between these lakes? A. Yes, sir.

Q. Do you know anything about how much that increased in height—that decayed vegetation? A. No, sir; I do not.

Q. Who was with you the other day when you made your measurements? A. My assistant.

Q. What is his name? A. His name is Oscar Kemp.

Q. Did he carry the rod? A. No, sir; he did not. I carried the rod myself.

Q. And he worked the instrument? A. Yes, sir.

Q. Did you verify his work? A. No, sir; not further than that. A man cannot verify it. If he can stand at two places at the same time he can verify it.

Q. Did Mr. Hardin direct you to do this? A. He directed me to go down and take the levels on it. No, sir; he did not either. I suggested to him the fact that he needed to have it in order to find out whether there were any holes between the meander line and the ridge that would bear out the statement of the government notes as to the three and a half feet or thereabouts, and I found none. I found that the surface of the ground—there was nothing to exceed two or three tenths in difference in the elevation. It was my suggestion that I went there.

Q. In a swale like that, with the muck from a foot to a foot and a half deep, with quicksand underneath, would there be any permanency of any small holes that might be along the line? A. Well, I should hardly think that anyone could tell now at the present time what was there fifty years ago. There might have been holes there.

Q. Did you put your rod exactly on the fractional quarter in reaching the result of 2.2? A. Well, you could have got two or three tenths difference right in that neighborhood, within three feet of the meander corner; you could have got two or three tenths difference, and I stood there right at the meander corner, which was higher than the lowest holes that were there. There is cattle tracks, or horse tracks, or men's tracks there, but I didn't put it on the very highest point.

Q. It seemed that cattle right at this point would sink in? A. In wet weather they would.

Q. How far would they go in? A. I could not tell you about that.

Q. You sought the highest points, didn't you? A. No, sir; I did not.

MR. DENT: That is the corner of the section line? A. That would be what we term the fractional corner of sections 19 and 20.

Q. You do not mean meander corner? A. No, sir; I do not. I mean the fractional corner of sections 19 and 20.

MR. BENNETT: Q. That is the intersection of the meander line with the section line of 19 and 20? A. Well, it is where the meander line was started to run over to the east.

Q. Don't you know from the field notes of Mr. Wolcott, or know personally, that that has been dug up there for the purpose of burning charcoal at that point, and for other purposes? A. No indication of it now at the present time, and I don't know it personally, either.

Q. The way you reach your result is to add simply the three feet and two feet two inches that you found on putting your rod there at that corner? A. The three feet and the fraction to the two feet I got there.

* * * * *

Q. The only reliance you have for your computation as to the height of water in 1835 is in reference to this line that you have just testified about under these circumstances? A. That would be one of the strongest points. The other point which I stated at the natural outlet of the lake in section 30 would indicate high water. That is what I testified to before. That would indicate high water.

* * * * *

Cross-Examination resumed by MR. GREGORY.

Q. I now direct your attention to this mistake which you say existed in the distance of the original survey of about ten chains. I would like to have you state now, as you said there was an error of that kind, what that error was? A. Well, now, I cannot tell you positively about it. The recollection that I have is that all the notes of the outlet—the natural outlet—what we term the natural outlet, near the center of section 30—is located south of the center of section 30 instead of north of the center of section 30. That is my recollection of it. It is a good many years since I have had hold of that note, and it was not an important point in my survey, because I did not run out the meander lines except for the purpose of getting a general idea of the property.

* * * * *

Q. Your recollection is that if that outlet were delineated on a plat in accordance with the field notes of the original survey it would appear a little south of the center line of 30 instead of a little north? A. Yes, sir.

Q. Is that the only error that you know of? A. That is the only error that I remember of now.

Q. That is the error you refer to? A. Yes, sir. I have a very indistinct recollection of it. That part of it I remember quite

distinctly that the government notes show that it was about as much to the south of the center of the section as this one is north of the center of the section. At that time I knew just what it was, for I knew the meander lines.

Q. Referring to the plat, this original survey, that shows the outlet considerably north of the center of 30, don't it? (indicating). A. Yes, it does, a great way further north than what it is located on any of these maps. It may possibly be it is to the north instead of to the south. I don't remember distinctly in reference to it. The meander lines are correct. It is only a note in the government notes as to the location of the outlet.

Q. That is, the courses and distances are correct, as far as you know, but it is only a note in the field notes stating where that outlet was located? A. Yes, Mr. Bennett read it yesterday, and the location of it it is not correct, as I recollect it, by the government notes, and that is the only error.

Q. You mean that by taking the government notes and examining them you could have discovered that error? A. No, sir.

Q. It is only by correcting it in accordance with your subsequent surveys? A. Yes, sir; locating it on the ground by the correct lines.

Q. It is barely possible that the outlet might have been located fifty years ago? A. No, sir.

Q. Not possibly? A. No, sir.

Q. Sixty years ago? A. No, sir.

Q. There is not any flow of water through the old natural outlet now, is there Mr. Rossiter? A. Not at this present time, there would not be. At high water there would be.

Q. The present outlet there is an artificial one, is it not, and run not in such an irregular way as the natural outlet? A. Yes, sir.

Q. It runs in straighter lines? A. That is an artificial outlet.

Q. How did you locate the old natural outlet? A. By running a survey from the fractional corner of sections 19 and 30.

Q. Did you locate it by an examination of the grounds to see whether there was evidence of there having been a natural outlet there? A. Yes, sir.

Q. What data did you have to locate it by running this line from the center of 19 and 20? A. Well, my survey running down to that would show that it did not correspond to the location by the government survey, but just which way it was I would not swear positively.

Q. How would your survey show that it did not correspond? A. Suppose that the government notes said that outlet was thirty-five chains north of the south line of the section, and I should measure up there and find it fifty chains instead of thirty-five.

Q. Would you find the outlet on that ground? A. Yes, sir.

Q. That would not have anything to do, whether you started from section 19, or whether you started from Indiana or Hyde

Park? A. It would make a great deal of difference where I started from in the government notes.

Q. What I mean is, the only way you have of correcting what you say is an error in the government notes, is by going onto the ground and locating that old channel, isn't it? A. That is it.

* * * * *

AUGUST NEUBEISSER, a witness called on behalf of defendant Gertrude H. Hardin, being first duly sworn, was examined in chief by MR. DENT, and testified as follows:

Q. What is your name? A. August Neubeisser.

Q. Where do you live? A. In Hegewisch.

Q. Have you at any time lived near or in the vicinity of Hyde Lake? A. Yes, sir.

Q. When did you commence to live there and where did you live? A. The last time I lived there was 1883.

THE COURT: Q. When? A. 1883.

Q. Where? A. In Hyde Lake.

MR. DENT: Q. On what part? A. On Parson's place.

Q. That is west of Hyde Lake, in the southeast quarter of section 30, isn't it? A. Yes, sir.

Q. How long did you live there? A. Well, I have been around there since 1870. I have been living there—let me see. About seven or eight years.

Q. You lived there since 1870 up to what time? A. No, I was around there.

Q. What? A. I was around there.

THE COURT: Q. You have lived there seven or eight years? A. Yes, sir; I have lived there seven or eight years.

MR. DENT: Q. You mean you have been living in Parson's place now for seven or eight years? A. Yes, sir.

Q. Where are you living now? A. Between Wolf Lake and Hyde Lake, in Shedd's place.

Q. You are living now on the Reese tract, aren't you? A. On Shedd's place.

Q. Isn't that known as Reese's? A. Next to Reese's.

Q. The Reese tract? A. Yes, sir.

THE COURT: Next to Reese he says.

MR. DENT: Next to the Reese tract?

MR. DENT: Q. Is that north of Reese's Point or to the—A. North.

Q. North of Reese's Point?

MR. BENNETT: I object to this as leading.

MR. DENT: This is merely fixing the locality.

THE COURT: The witness does not speak very good English.

* * * * * *

MR. DENT: Q. Do you know the artificial channel south of the Bush place, between Hyde Lake and Wolf Lake? A. Yes, sir.

Q. That is the same as Field's place, is it not—Bush's place? A. It was Field's place—old man Field.

Q. Do you know how that ground is there, as to whether the water overflows at some times? A. Yes, sir; it was flowing over sometimes.

Q. North and south of the channel? A. Yes, sir; I went over there with a boat. That was in 1883.

Q. Where—what part? Did you go over in a boat? A. I went south.

Q. South of what? A. South of Field's place.

Q. How was it north of Field's house, and from there up to the timber? A. Why, there was water there, and swampy.

Q. Was not the water—do you know the water in Hyde Lake is affected by the state of water in Lake Michigan? A. Yes, sir.

Q. How much—how quickly is it affected? A. Well, that has no water at all, only ponds in there now; you can't do nothing with a boat.

Q. When is that so? A. What?

Q. When is the water mostly all in ponds? A. All this summer.

Q. It has been so this summer? A. Yes, sir.

Q. Had you seen it in that way the summer before? A. Yes; I was in there and could not get through with a boat. I waded all over it.

Q. How is the water in Hyde Lake affected by the winds—have you noticed? A. When you get a north wind then the water will raise.

Q. What brings the water in? A. From Michigan Lake.

Q. It comes from Michigan Lake? How is Hyde Lake to-day? A. It is low.

Q. Is it all in one body to-day, or how is it—Hyde Lake? A. Well, there is some ponds in there.

Q. Some ponds? A. Yes, sir.

* * * * *

Cross-Examination by MR. BENNETT.

* * * * *

Q. You say you went across from one lake to another in a boat south of the Field house; you went through the channel, didn't you? A. I couldn't see the channel there.

Q. You went in the place of the channel, didn't you? A. I could not see the channel there.

Q. You went in the place of the channel, didn't you? A. Well, I went over the ridge there.

Q. What? A. I went over the ridge there.

Q. Through where the channel was there? A. Not where the channel was; a little more north.

Q. But south of the Field house? A. South of the Field house.

MR. GREGORY: Q. Is the channel stopped up between Wolf Lake and Hyde Lake now? A. Yes, sir.

THE COURT: Stopped up?

MR. GREGORY: Yes, sir; dammed. We had a kind of an arrangement between the parties.

MR. BENNETT: That was done by consent, that it should not affect the status.

MR. GREGORY: It affects the stage of the water in Hyde Lake though—that is, it might. The testimony shows that Wolf Lake is a little higher than Hyde Lake.

MR. BENNETT: We have an understanding that it should not affect the status.

MR. GREGORY: Oh, without prejudice, certainly.

MR. BENNETT: Without prejudice to our rights.

MR. GREGORY: But as a matter of fact Hyde Lake is lower than Wolf Lake, and that might be an explanation.

Re-direct Examination by MR. DENT.

Q. You just stated that you crossed between the two lakes in a boat, as I understand; south of the Field house? A. Yes, sir.

Q. State whether you also crossed north of the Field house?

MR. BENNETT: I object. He went over that same subject.

MR. DENT: The reason why I do that is, that they tried to limit him in the cross-examination to crossing south of the Field house.

THE COURT: He said he crossed south of the channel.

MR. STRONG: North of the channel.

A. South from the Field house, crossed from one lake to another.

THE COURT: North of the channel, south from the Field house? A. Yes, sir.

Q. Is that it? A. South from the Field house, and went over the ridge.

Q. Which way was the channel? A. East and west.

Q. Did you cross north of the channel or south of it? A. South.

Q. South of the channel—south of Field's house? A. South of the channel—south of Field's house.

Q. South of the channel—south or north of it? A. I went across with the boat south from Field's house from Hyde Lake into Wolf Lake.

Q. Did you cross north or south of the channel—can't you understand? A. It was south.

THE COURT: He still sticks to it.

MR. STRONG: He said north before.

MR. DENT: Q. I want to see whether you crossed at a point farther north, too—north of Field's house.

MR. BENNETT: He has been all over that.

THE COURT: Ask the question. I wish you would get through with the examination of the witness in chief.

MR. DENT: Very well, your Honor.

Q. State whether you crossed at a point farther north, too, north of Field's house, between Field's house and the timber; did you cross there in a boat? A. I went south from Field's house.

THE COURT: Q. I understand that. Did you ever cross at any other place? A. I went more north from Field's place.

MR. DENT: Did you cross in a boat or could you have crossed in a boat? A. I crossed with a boat.

Further Cross-Examination by MR. BENNETT.

Q. You crossed in a boat where? A. North from Field's place too.

Q. When was that? A. In 1883.

Q. What month? A. It was in April.

Q. What were you doing over there? A. I was going out shooting.

Q. In April, 1883? A. Yes, sir.

Q. Which way did you cross? A. I crossed the ridge east and west.

Q. Which way did you go, east or west from Wolf Lake to Hyde Lake, or from Hyde Lake to Wolf Lake? A. From Hyde Lake to Wolf Lake and from Wolf Lake to Hyde Lake.

Q. At what point north of Field's house? A. Well, it was a good ways out. I went about—

Q. Didn't you get out and pull the boat over part way? A. No, I shoved it. I used the paddle.

Q. Was there a bridge anywhere near where you crossed? A. No, sir.

Q. Or a part of a bridge? A. No, sir; I didn't see any.

Q. Did you cross a road? A. No, I couldn't see the road where I went.

Q. Where did you get into Hyde Lake? Where did you come into Hyde Lake? A. Where I lived then.

Q. That is on the other side of Hyde Lake? A. Parson's place.

Q. What is it? A. From Parson's place I had to go—

Q. That is on the west side of Hyde Lake? Where did you strike Hyde Lake in coming over from Wolf Lake? A. It was north from Field's house.

Q. How far north? A. Well, I couldn't tell you exactly how far.

Q. You could not tell exactly how far? A. No.

Q. Were you alone? A. Yes, sir.

MR. DOUTHART: Q. Do you say you pushed the boat over? A. Yes, sir.

* * * * *

Re-cross examination by MR. DOUTHART.

Q. What month did you push the boat over? A. It was in April.

Q. Through the grass? A. It was in that water.

Q. Was there any grass there? A. It was all weeds and stuff—floating.

Q. The water was on the land? A. I couldn't tell what it was.

Q. How far did you push the boat before you could row it? A. I pushed it about—I couldn't tell you exactly—about three hundred feet.

Q. You had to push it three hundred feet? A. Yes, sir.

Q. Then you could row it again? A. Yes, sir.

Q. What do you mean by "pushing" it? Did you stand up in it? A. Yes, sir.

Q. And stick an oar in the ground? A. Yes, sir.

Q. Then it slid along over the wet grass? A. There was water in there.

Q. How much water? A So the boat went over.

Q. So you could push it? A. Yes, sir.

Q. But the boat would drag on the ground, wouldn't it? A. The boat was floating on it.

Q. The boat would drag on the ground—the bottom of the boat, when you pushed it over the grass? A. I don't know.

Q. You did not sit down and row across as though you were in the middle of the lake? A. I pushed.

MR. BENNETT: You have talked with Mr. Hardin about this, haven't you? A. What?

Q. You have been talking with Mr. Hardin about this, haven't you? A. No.

Q. Not at all? A. No.

* * * * *

2 o'clock P. M. Court met pursuant to adjournment.

HENRY H. HANDY, called as a witness on behalf of the defendant Gertrude H. Hardin, was duly sworn and testified as follows:

Direct Examination by MR DENT.

Q. Please state your name and your business? A. Henry H. Handy; abstract maker.

Q. With what company are you connected in business? A. At present the Title Guarantee and Trust Company, and Handy & Company.

Q. How long have you been in the business of making abstracts? A. About thirty years.

* * * * *

Q. Mr. Handy, have you had in your office or possession any old maps—accredited maps, representing Wolf Lake? A. That map belonged to a gentleman in the office, Mr. O'Connor. It is one purporting to have been made by James H. Rees.

Q. Who was James H. Rees?

MR. BENNETT: Mr. Dent, I would like to have you state the object of this evidence.

MR. DENT: I want to introduce these maps. It is to show the reputation, I may say, among those who understood these matters as to this lake.

Objected to by MR. BENNETT.

THE COURT: This may turn on the question as to what name it was known by at this date.

MR. DENT: Well, the outlines of it, also. It will show what the reputation was in reference to its name and its general outlines.

THE COURT: What is it entitled?

MR. GREGORY: It is entitled, "Map of the Counties of Cook and DuPage, the east part of Kane and Kendall and the north part of Will, State of Illinois, prepared by James H. Rees."

THE COURT: It is a contemporaneous document, touching the subject-matter, I think, here. Can't you get through with Mr. Handy and decide the question afterwards?

MR. DENT: Q. Mr. Handy, I have called your attention to this map, which I propose to exhibit to the court, entitled, "Map of the Counties of Cook and DuPage, of the east part of Kane and Kendall and north part of Will, State of Illinois, compiled by James H. Rees, Land Agent, Chicago, Illinois, 1851." I ask you who Mr. Rees was? A. Mr. Rees was an old citizen of the state and county. He was formerly in business with Rees, Chase & Co., in making abstracts of title. I have always understood that he was a surveyor and civil engineer by profession.

Q. Is Mr. Rees living? A. No, sir.

Q. How long has he been dead? A. About four or five years.

Q. He was one of the early abstract makers in the county, wasn't he? A. Yes, sir.

Q. One among the very earliest, wasn't he? A. Yes sir.

Q. What do you know of this map, as to its age? A. Nothing at all.

Q. And general authenticity? A. I know nothing of it, except that it was presented to Mr. O'Connor in our office by Mr. Wolcott, the late County Surveyor.

Q. How long ago—how long has it been in your office? A. Three or four years—perhaps four.

Q. Has it been received as an authentic map, do you know, or so used? A. Well, it has never been used but very seldom in our office, because we had no occasion for its use.

Q. Had you known of maps similar? A. Yes; we had one in our office before the fire; one the same as that; just like it; I suppose made at the same time that this was.

Q. It was then a map in current use, was it not? A. Yes, sir.

Q. Was it accepted? A. It was, as I understood, always.

Q. Then, if you will, please, take the other map which you have introduced. I have not yet noticed the title of it; you may read

HARDIN'S EXHIBIT

HANDY No. 2.

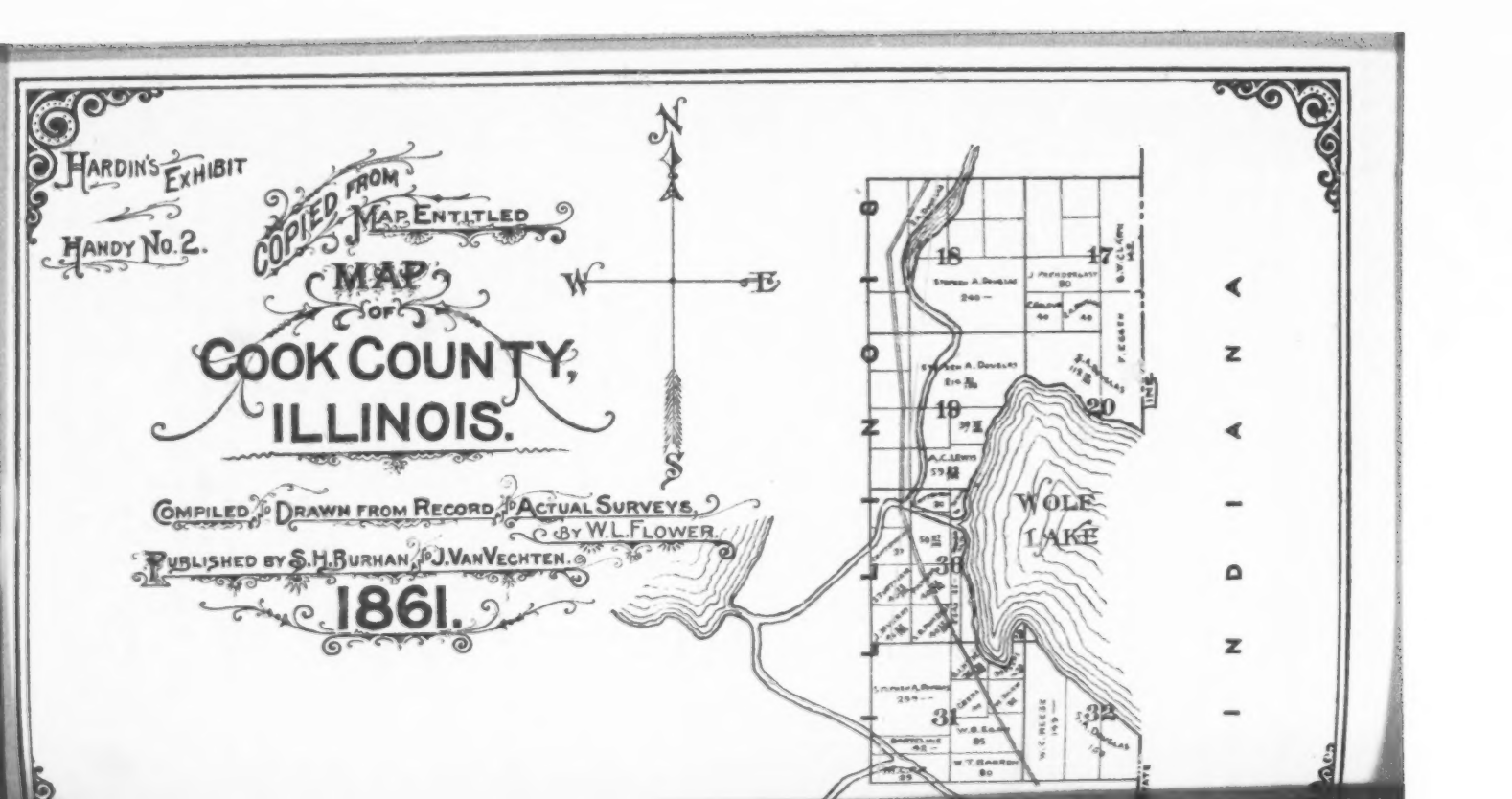
COPIED FROM MAP ENTITLED

MAP OF COOK COUNTY, ILLINOIS.

COMPILED & DRAWN FROM RECORD & ACTUAL SURVEYS,
BY W. L. FLOWER.

PUBLISHED BY S. H. BURHAN & J. VAN VECHTEN.

1861.



HARDIN'S EXHIBIT
HANDY No. 1.

COPIED FROM MAP ENTITLED

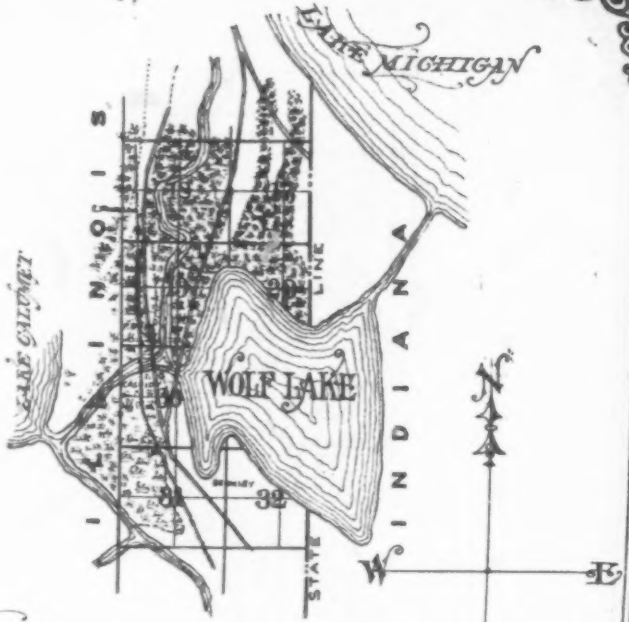
MAP OF THE COUNTIES OF COOK AND DUPAGE, THE EAST PART OF KANE & KENDALL, & THE NORTH PART OF WILL.

STATE OF ILLINOIS.

COMPILED BY
JAMES H. REES
LAND AGENT.
CHICAGO, ILL.

1851.

SCALE, 1 INCH = 100 CHAINS.



FOLLOWING NOTE APPEARS ON SAID MAP

ENTERED ACCORDING TO ACT OF CONGRESS IN THE YEAR 1851 BY JAMES H. REES
IN THE CLERKS OFFICE OF THE DISTRICT OF ILLINOIS.

COPIED BY F. C. ROBERTS SURVEYOR ROOM 1 - 34 WASHINGTON ST. CHICAGO ILL.

the title, if you please, and you may give an account of the map after you have read the title. A. It is entitled: "Map of Cook County, Illinois, compiled and drawn from record of actual surveys by W. L. Flower. Published by S. H. Burhans and J. Van Vechten, 1861."

Q. Please give an account of that—what you know of it. A. Well, I purchased it of a map dealer, I think, about a year ago.

Q. Had you known something of it before? A. Well, I remember Mr. Van Vechten was a map maker and publisher in the days before the fire.

Q. You can state whether that is, in your judgment, an authentic map of the date of the publication named on it? A. Well, I could not state anything as to the correctness, nor anything of that kind, although this map, I remember, was in general use by real estate men and abstract makers.

Q. At what time? A. At its date—about that time. I remember the map, or a map of this kind.

Q. I call attention at present showing Wolf Lake, this being the earlier one.

Cross Examination by MR. DOUTHART.

Q. You don't know personally that these parties made these maps? A. No, nothing more than general repute.

Q. And what appears on them? A. Yes, sir.

Q. That is all you know about them? A. Yes, sir.

The COURT: Do you know whether Mr. Rees was a map maker and publisher? A. I always understood this map was made by him. I think I have heard him state so himself.

Q. Do you know of his making any others? A. No, sir; I think this is the only map that he made of the county that I ever saw or heard of.

* * * * *

Court adjourned to meet at 10 o'clock A. M. next day.

10 A. M. Thursday, December 3rd, 1891.

* * * * *

THE COURT: Gentlemen, I am inclined to think that this is admissible on the question of reputation, on the question of the reputation of the name of this lake. I will admit it subject to the objection of parties, for that purpose. I suppose its being in for one purpose, if it is admissible for the other, you can get advantage of it; but I shan't consider it on the question of the geographical boundaries or location—I shall not consider it in that regard—either of these maps.

(Said maps are herein inserted, marked "Hardin's Exhibits Handy No. 1 and Handy No. 2.")

ISAAC N. HARDIN, called and sworn in behalf of Gertrude H. Hardin, was examined in chief by MR. DENT and testified as follows:

Q. Mr. Hardin, are you acquainted with the premises under consideration in this case? A. I am.

Q. How long have you known of those premises? A. About twenty-five years.

Q. Will you state what opportunities you have had of knowing these premises, and especially of the lake as you knew it first and have known it since? A. I have been down there practically about every year since I first knew it. Sometimes several times during the year.

Q, You may speak first, if you noticed the west side of what is now known as Hyde Lake; state whether you knew of an outlet to the west, and what you knew about that, and the situation of the lake as to its proximity to Indian Ridge road and so on when you became acquainted with? A. The first time I saw the lake, about 1867, I approached the lake after crossing the Calumet River at Chittenden's bridge. I forded the outlet of the lake into the Calumet River and approached the lake in southeast of 30. That was my first view of it.

Q. How was the lake then as to its proximity to Indian Ridge road? A. The lake then was close to its banks, near the ridge.

Q. And in reference to Indian Ridge road, how was it? A. Very near the Indian Ridge road. The Indian Ridge road runs practically along its bank for the most part.

Q. What part of the premises under consideration is crossed by the outlet when you first saw the lake—the outlet to the Calumet River of which you have spoken; where did that enter the lake and where did it enter the river? A. In the lower part of the northeast quarter of 30 was the outlet of the lake, and it emptied into the Calumet River near Chittenden's bridge in the tract adjoining on the west—that would be the northwest quarter of 30.

Q. What was the character of that outlet as to breadth and situation generally? A. The place where I forded the outlet was forty or fifty feet wide; to the west the outlet spread out into a wide slough. Near the river it assumed the form of a bayou—a deep wide bayou near the river.

Q. You may state whether you have seen the lake when it presented different appearances, and generally how different the appearances were as to size and so on? A. I have seen it at various stages of water. Sometimes the water seemed lower than at other times.

Q. When did you next see it after 1867? A. Well, I am not sure that I saw it the following year.

Q. Did you see it about 1874 at any time? A. I beg pardon.

Q. About 1874; did you see it at any time? A. Yes, sir; I saw it then, but I saw it before 1874. I remember of seeing it in

either 1869, 1870 or 1871, when the lake presented a very different appearance to what it did when I first saw it.

Q. In what way did it present a different appearance? A. It was very much lowered. The westerly part of the lake, that portion that is now called Hyde Lake, the waters had almost entirely disappeared. The remaining waters were divided into ponds.

Q Can you fix the date at which that appearance of the lake exhibited that appearance to you? A. I cannot, with definiteness.

Q. How much did you observe at that time—what observation did you take of the lake? A. Oh, I went there in reference to matters connected with that property, and had occasion to notice the elevation of the water. In fact, I was very much struck with the wide difference in the appearance which the water then gave and the time I first saw it, or the time I had seen it previously.

Q. Do you know of any changes having been made in this outlet to the west or in the connection between what is now known as Hyde Lake and what is now known as Wolf Lake, in either of these periods—have you known of changes? A. I know there has been a public road thrown up across the outlet which has prevented the circulation of water, and I know that there has been—

THE COURT: Q. What outlet are you talking about now? A. The original outlet of the lake, Your Honor.

Q. You mean into the Calumet? A. Yes, sir. (Continuing answer) —ditch constructed through there by the railroad company, following a part of the former outlet towards the lake, but cutting through into the lake south of the old original outlet.

Q. Do you know about when that change occurred or was made? A. About 1886.

Q. You have spoken of visiting the premises in 1874, as I understand it, at some particular time; will you state what observation and the extent of the observation you made at that time with respect to the lake? A. I was there in 1874 and found the water again very low.

Q. Did you at any time pass from Wolf Lake to Hyde Lake in a boat, and if so, when? A. Yes, sir. The first time I went through was in 1874.

Q. Where did you go? A. I went through from Wolf Lake into Hyde Lake south of the Field house, through an apparently artificial cut.

Q. What was the stage of water in the lakes at that time? A. It was very low. I remember my boatman was obliged to get out of the boat to get me through the cut; and in Hyde Lake I found the water so low that it was with difficulty that he could pole me about. We could not go continuously about the lake.

Q. When did you next see the lake, to make special observation? A. In 1876.

Q. How was it then? A. The water was very high then. The lake then assumed the appearance that it had during the times when I first saw it.

Q. How was it with reference to the water on the west shore, where the Rosenquist and Smith houses are given, on this map, which is in the presence of the court? A. At that time the water came right up to both houses.

THE COURT: Q. What? A. The water came up to both those houses.

Q. What houses? A. The Rosenquist and the Smith houses.

MR. DENT: Q. How was it then as to the Cleveland house? A. In 1876 I did not observe the Cleveland house.

Q. Did you attempt about that time to drive from Reese's Point north? If so, you may state whether you did drive or could drive? A. Not in 1876.

Q. Did you afterwards at any time, and if so, when? A. I did; in 1882.

THE COURT: Did what?

MR. DENT: Attempted to drive from Reese's Point north.

MR. DENT. Q. You may state, if you please, whether you did drive and how you could get along through between the two lakes, in driving along the road? A. After leaving Reese's Point I found the water covering all the space between the Point and the Field house; there appeared a bridge, and near that bridge were some people fishing, and I called to them to know if I could drive across to Field's house, and upon their answer that I could do so, I drove in across the bridge and up to Field's house. The water then came up to the road and crossed the road in many places, and almost submerged the bridge.

Q. Where was that bridge? A. The bridge was across the artificial cut south of Field's house.

Q. Who was occupying the Field house at that time? A. Fogli.

Q. You can state whether that road was a constructed road—whether it was graded or thrown up on top? A. Yes, sir; it was.

Q. And whether in driving you could follow it at that time and did follow it? A. I could and I did follow it.

Q. After getting to the Field house did you drive farther north? A. I did.

Q. How—in what way did you drive further north? A. I had asked the occupants of the house whether I could drive north to Smale's house, and following their direction I drove out eastwardly into the lake on the hard sand bottom, I should think a distance of 200 or 300 feet, and when I found the water was getting pretty deep I stopped and spoke to them again, and receiving their assurance that I could, by following the directions given, go on with safety, I drove on north in the direction of Smale's Point, until somewhere about abreast of the point, when I left the lake and drove on to the Point.

Q. Where would be your point of turning off again to the constructed road, indicating, if you can, on the map? A. I think it was near the south end of the Smale Point.

Q. Smale Point projected from section 20? A. Southwest 20; yes, sir.

Q. Did you see Mr. Smale at that time? A. I did.

Q. Mr. Jabez C. Smale? A. I did.

Q. Where was he living? A. He was living on the Smale Point.

Q. How was the water with reference to his house—to the house in which he lived? A. The water came up within a few feet, say sixty or seventy-five feet, upon the east side, and much closer than that upon the west side of his house.

* * * * *

Q. How was the land or the water south of the Condit house and down to the Fogli house, if you know it by that name, at that time? A. The land then was all covered with water. It was the bed of the lake.

Q. You can state whether there was between those intervening points any separation of the lakes, and, if any separation, what it was? A. There was no separation.

Q. How was it at that time about the Cleveland house, as to water? A. The water came right up to the Cleveland house—close to it.

Q. Were you down there and about these premises at any later time in 1882, that you remember? A. Later than 1882, do I understand?

Q. I mean any later time in 1882? A. No, sir.

Q. When were you next there? A. In 1884. I don't recall that I was there in 1883.

Q. What time in 1884, have you in mind? A. In the summer.

Q State what you did with reference to passing over this intervening strip or space between the two lakes, if anything, at that time, and what part you passed over, and how you found it as to the land or water? A. I did not pass over I approached the lake from the north—drove down to Smale's house, and from Smale's house walked down to the end of his point, and there I observed the lake.

Q. How did you find it at that time? A. The water covered all that space, the water covered everything between there, except the wooded elevation south of Smale's Point, to Field's house.

Q. How was that wooded elevation? A. It was an island.

* * * * *

Q. When did you next visit the lake to make any special observation, that you have in mind now, if you have it in mind? A. In the summer of 1885 I was there.

Q. What observation did you make then—what did you find? A. I drove again to Smale's house. I observed the water on the east and to the west of his house. I drove down to the end of the point and observed the water lying between the end of the point and the next elevation. And from there I drove, or rather from Smale's Point I drove, into the lake to the east, about upon the same line

that I did in 1882, down to Field's house, and then on to Reese's Point.

THE COURT: Q. Field's house? A. Yes, sir.

MR. DENT: Q. That was driving from the north towards the south? A. South.

Q. South or southwest at that time? A. Yes, sir.

Q. Did you observe the road at that time from Smale's Point south, whether there was a constructed road—did you observe it at that time? A. It was not observable. The water covered everything there.

Q. When did you next visit the premises to make observation, or special observation, and from which way did you make your observation, and at what place? A. Later in that year I was there again.

Q. You can state whether you found a different state of things, and in what respect you found them? A. I found the water slightly higher than it was before—that is, before in that season.

Q. Coming down to 1885, did you at any time during that year visit this property?

THE COURT: That is what he is speaking about?

A. This is 1885.

THE COURT: This is what he has been speaking of—1885.

MR. DENT: I thought he spoke of 1884.

THE COURT: He had already.

MR. DENT: Q. How was the water with reference to the west bank of Hyde Lake, or the western limits of Hyde Lake, at this time you have just been mentioning, in 1885? A The last time?

Q. Yes. A. It was close to the bank on the west side.

Q. You can state whether on this occasion you used the boat in passing about from different points, and if so, where? A. The last time, 1885, I understand you?

Q. Yes. A. No, sir; we did not use the boat. There was quite a party of us. Judge Gresham was one of the number. We equipped the judge in rubber boots and made the crossing from Smale's Point through the lake to Field's house in boots.

Q. At what date was that? You said 1885, but at what time in 1885, do you know? A. Well, it was later in the season than my first experience.

THE COURT: Q. You mean you went along the east of the lake around to the Field house? A. No, sir. We went right south from the point—southwest.

Q. From Smale's Point? A. From Smale's Point.

Q. Right through to Field's house? A. Right through to Field's house. It was after the trial before Judge Gresham.

MR. DENT: Q. Was it before the judgment? A. Before the judgment.

Q. While the cause was under advisement? A. Yes sir.

Q. Who accompanied you?

THE COURT: Did you get that into the record?

MR. DENT: No, I believe not.

MR. DENT: Q. Was Mr. Bennett along? A. The party consisted of—besides Judge Gresham, Gen. Hawley, who was one of the attorneys for Mr. Bennett, Mr. John I. Bennett, Judge Prescott, Mr. Kemp, the court's clerk, Mr. Burnham, the court stenographer, and I. It seems to me there was a gentleman driving one of the carriages, a relative of Mr. Bennett.

MR. GOUDY: Q. Didn't you have the marshal along? A. We first inspected the west point of land or tongue running into the lake west from Smale's house.

MR. DENT: Q. Does it run west from Smale's house? A. It runs—

Q. Or how is it? A. It lies west of Smale's house and runs from the southwest of 20 southwesterly into the lake. Mr. Bennett had provided the judge with a pair of boots—rubber knee boots. Mr. Hawley and I went down to Smale's, and we each succeeded in getting a pair of hip boots. Mr. Bennett had a pair of hip boots. Judge Prescott was not so fortunate. We went down the westerly point first; that westerly spur; I mean the westerly side of that westerly spur, until we came in view of the Smale house. From that point Mr. Bennett sent a cry across the water, to which Mrs. Smale replied that we could not cross there; it would not be safe. I think some one had attempted it and had difficulty in getting out. So we retraced our steps back on the easterly side of that spur to where we had left our carriages. Then we walked down the Smale Point to the house and to the end, inspecting the water on both sides as we went along. When we got to the end of the point we crossed the corduroy bridge, or corduroy road I mean, connecting that point with the elevation of land to the west and south, called here "Island," and then we walked to the south end of the island. When we got there Mr. Bennett suggested to Judge Gresham that perhaps we better go back and get into the carriages and drive out into the lake and go south. Up to this time I had been mute.

Q. State just what occurred. You may state just what occurred.

MR. DOUTHART: I don't think these conversations are admissible.

THE COURT: Well, go on. State what occurred.

MR. DENT: Q. How you went and what you found? A. Well, we did not go back to the carriages, but we proceeded—that is, Judge Gresham, John I. Bennett and Judge Prescott and I to cross the lake to Field's. I preceded the party a short distance south of the south point of the island; I found a newly-constructed road—that is, piles of brush had been thrown in, and on top of this brush was hay—extending all the way across. We took to that hay pile and attempted to make the crossing, the water coming up through the hay by reason of our weight, at every step we took. Occasionally I would step off from the hay pile into the soft material, into the water, into the soft bed on each side, and would probe through

with Judge Gresham's cane to show him the depth of the water and the depth of the mud. In that way we proceeded south to Field's place. We rested there a while. The carriages soon came and some of us got into the carriages and others walked then south from Field's place to Reese's Point. From there we drove around on the western bank of the lake and home.

MR. DENT: Q. You came up on Indian Ridge road, then, coming home? A. Yes, sir.

Q. There was no railroad then, was there, such as is represented on this profile map? A. No, sir.

Q. The Chicago and Southern Railroad had not been constructed? A. No railroad there at all.

Q. What is the character of the growth between Smale's Point and Reese's Point—what is the character of the soil of the intervening space of ground? A. It is a grassy bar. It is a muck deposit with all kinds of growth usual to wet, low places—that is, swamp grass.

Q. As to trees there, where were those trees interspersed, or were they on spurs or otherwise? A. The trees upon the middle island—that is, the island south of Smale's Point, at the south end of the island, are elms. Along the center to the northerly part they are a recent growth of poplars. There is now some underbrush. On the Smale ridge there is a variety of trees—elms, basswood, oak, etc., and some undergrowth.

Q. About how wide was the Smale ridge, and how wide was the island or unsubmerged ground at that time you have last mentioned? A. I should judge the Smale ridge would average from fifty to seventy-five feet unsubmerged—probably that may be a little under it. It might average from fifty to 100 feet unsubmerged. The upper part of the ridge—I mean the top of it, is very narrow in some places. It is difficult to state just the average elevation. It is not of a uniform width. The island to the south is very much narrower; in some places that was not to exceed twenty-five feet in width at that time.

Q. In looking at it from the south or southwest, how would it appear as to width, did you ever observe? A. It appears very much wider. The island turns off to the southeast, and I observed that out from that point one would get the impression of quite an extensive growth of trees there, but that disappears as you approach it. You see it is but a mere thread.

Q. That is on account of the irregular outlines? A. Yes, sir; the shape—the outlines.

Q. Were you down there again in 1885, and did you make any observation at that time? A. Not in 1885; no, sir.

Q. When were you next there to make observations? A. I was there in March, 1886.

Q. Did you see Mr. Smale at that time? A. I did not.

Q. How was the water with reference to the Smale house, if you observed, at that time? A. I did not go over to the Smale

house. I went down from South Chicago to the west side of the lake on Indian Ridge. I found the water then very high. It was running across Indian Ridge, in the upper portion, southeast of 19, and from that point of observation I could see the water extending and covering all that space south and north of Field's house to the strip called "island," and south of Field's house extending over to the east shore of Indiana.

Q. Did you go there in 1886? A. This was in March, 1886, which I have just fixed.

Q. Yes, that is the point that you have just been telling of? A. Yes, sir.

Q. Have you observed these premises very lately—these lakes? A. I have.

Q. How are they now—how is Hyde Lake especially? A. I was there only a few days before the commencement of this trial. The water of the lake had receded so that there remained in Hyde Lake only a few ponds; that is to say, what remained of Hyde Lake was only a few ponds—mud holes.

* * * * *

ANNIE NEUBEISSER, called as witness on behalf of the petitioner Shedd, was duly sworn and testified as follows:

Direct Examination by MR. GREGORY.

Q. What is your husband's name? A. August Neubeisser.

Q. He lives on a strip of land between Wolf and Hyde lakes, I believe? A. Yes, sir.

Q. You have lived about there, off and on, a number of years, I believe? A. Yes, sir.

Q. Where were you living in 1883, in the spring and summer? A. We were living on Steel and Rand's property—what used to belong to Parsons.

Q. That is on the west side of Hyde Lake? A. Yes, sir.

Q. Were you married then? A. Yes, sir.

Q. Were you keeping house there? A. Yes, sir.

Q. Who was your father? A. Joseph Könyvesy.

Q. He also lived in that region, did he not, at one time? A. Yes, sir.

Q. Did you know the place commonly called the Field place, or at one time called the Field place—Field house? A. Yes, sir.

Q. How was that situated with reference to the place where you lived in 1883, in the spring and summer? A. Well, how?

Q. Could you see it? Was it in sight? A. Yes, sir; we could see it.

Q. It was across Hyde Lake from your place? A. Across Hyde Lake from us.

* * * * *

Q. You are now living just south of the Field place, south of the cut, I believe? A. South of the cut.

Cross-Examination by MR. DENT.

Q. You know where that cut or slip is, do you not, between Wolf Lake and Hyde Lake? A. Yes, sir.

Q. Please state whether you have seen the waters extending on either side of that cut between the two bodies, between Wolf Lake and Hyde Lake? A. Yes, sir; I have.

Q. Do you know of a space between that cut and the Field place—a low place anywhere—low ground? Do you know of waters extending over that low ground between the two lakes? A. The water was over there several times, most always—part of it.

THE COURT: Q. South of the Field place? A. Yes, sir.

MR. DENT: Q. As to the space between the lakes, between the Field house and the trees on the north, did you see water at any time? A. Well, I have seen Wolf Lake and Hyde Lake that it looked like one, as if it was one lake.

Q. Did you ever cross in a boat between the two? A. Yes, sir; I have.

Q. Many times? A. Well, I don't know how many times. I don't generally go over there alone.

Q. Do you know the Cleveland house? A. Yes, sir.

Q. Do you know when the house was torn down where Mr. Cleveland once lived—when the Cleveland house was torn down? A. Yes, sir; I know when it was torn down.

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Cross-Examination by MR. BENNETT.

Q. Mrs. Neubeisser, Joseph Könyvesy was your father? A. Yes, sir.

Q. Where did your father live before he went off to Dakota? A. Well, he lived on a piece of land that he was claiming.

Q. Well, before that? A. Well, that depends on how many years.

Q. Well, before he made the claim? A. We lived up where Hegewisch is built at present.

Q. I don't mean as far back as that? A. Then on the Parsons place.

Q. Where is the house on the Parsons piece with reference to the claim he made from the government afterwards? West of it? A. I don't understand that?

Q. Where was the house on the Parsons place where he lived and where you lived before he made a claim to government land? A. Where the Parsons house was?

Q. Yes, where was it? A. I suppose it was on the Parsons tract.

Q. On his tract? A. Yes, sir; I suppose so.

THE COURT: Q. How was it with reference to the place where your father claimed as his own? A. I don't know how you mean. I don't understand that.

MR. BENNETT: Q. Was the house where you lived west of the

claim that your father made from the government? A. It was west of it.

Q. Always west of it? A. Yes, sir.

Q. What year was it that he first made that claim? A. I am sure I cannot tell you exactly the year.

MR. DENT: I don't see the application of this.

MR. BENNETT: Q. Was it in 1874 or 1875? A. Well, I think it was about around there; something like that. I was married in 1876. I know I kept the place.

Q. Well, your father continued and you continued to live largely in the Parsons house, didn't you, afterwards? A. We lived in the Parsons house.

Q. You built a small house on the claim east? A. That is where my father did; yes, sir.

* * * * *

Q. You say you could see the Field place across the lake? It was some distance, wasn't it? A. Yes, sir; it was some distance, but you could see it real plain.

Q. How far was it? A. I don't know how far it was. I can't tell that, but I can see that far.

Q. Was you ever near the Field house? A. Yes, sir; I was near it on the lake.

Q. On what lake—which lake? A. Hyde Lake.

Q. Did you go to the house at any time? A. I did not go in the house at any time.

Q. You did not go very near the house, did you? A. I went as near as I could go with the boat.

Q. In the lake? A. And that was very near, too.

Q. And what you mean to say is, you did not see anybody around when you were there? A. No, sir; I did not.

Q. Do you know Benjamin Foglí? A. I know him now, but I had seen him once before that when I lived there.

Q. Didn't you see him around at any time? A. No, sir.

Q. You know where the cut is between Wolf and Hyde lakes? A. I know where it is; yes, sir—now.

Q. It is right south of the Field house, isn't it. A. Yes, sir.

Q. You say you have seen the water run from lake to lake on the side of that cut—on both sides of it? A. On both sides I have seen it many a time.

Q. Well, I think that is the only place you speak of water running across from lake to lake—a current of water. You have not said anything about any other place, have you? A. When the water is high in one place it is generally high in another.

THE COURT: She said both sides of the Field house, and also that it looked like one lake.

MR. BENNETT: Q. When was it that you say it looked like one lake? Was it in 1882? A. No, sir; it was not in 1882. I was not living there in 1882.

Q. You went off in 1883? A. I was in Chicago then, but I was out there every week or two.

Q. When was that? A. Well, I did not keep account of the year—just what year it was.

Q. Do you recollect whether there was ice at the time that the water had that appearance—ice on both lakes? A. No, sir; it was in the spring and summer. In 1876, I know it was.

THE COURT: Q. You say in 1876 it looked like one lake? A. Yes, sir.

MR. BENNETT: Q. It was in case of very high water, wasn't it, Mrs. Neubeisser? A. Well, I should say it was high water, but as a general thing we had that kind of water most every summer and spring, and winter of course it was the same; there was ice.

Q. You can't tell what years those were? A. Well, you remember in 1877, when my husband took you and Mr. Field across, how high the water was? The water was not, perhaps, clean over the ridge, but it was up to the house at that time? I suppose you remember. It was in 1877.

Q. Well, you remember better than I do. A. I do. You got in the mud. My father helped you out. Do you remember?

Q. Well, you could get in the mud most any time, couldn't you, on the west side of the lake? A. On the west side?

Q. On the west side of the lake? A. It was the east side of Hyde Lake. We were living at that time on the Parsons place.

Q. Well, you only knew about it by your father telling you, didn't you? A. I seen you when you came back, of course—when you dried yourself. You had a little stove along—a little kettle.

THE COURT: Didn't have on his rubber boots, did he? A. No; he didn't have rubber boots on, but he was good and wet. It was in the spring of 1877.

MINNIE LANGLOTZ, a witness called on behalf of the petitioner Shedd, was duly sworn, and testified as follows:

Direct Examination by MR. GREGORY:

Q. What is your name? A. Minnie Langlotz.

Q. Where do you live? A. I live east of the Hegewisch depot.

Q. How long have you lived there? A. The last eight years.

Q. Did you build the house that you live in? A. Yes, sir.

Q. Have it built yourself? A. Yes, sir.

Q. That was eight years ago this last summer, wasn't it? A. Yes, sir.

Q. Or spring? A. Spring.

Q. 1883? A. Yes, sir.

Q. Do you know the place called the Field place? A. Yes, sir.

Q. Situated on a strip of land between Wolf and Hyde lakes? A. Yes, sir.

Q. Do you remember seeing that place there during the summer of 1883? A. Yes, sir.

Q. Was there anybody living in it at that time? A. No, sir.

Q. What was the condition of the place as you saw it then? A. Well, the doors were open and the windows were down, of course. There was nothing else in it.

Q. You mean closed? A. Closed.

* * * * *

Cross-Examination by MR. DENT.

Q. Do you know the Cleveland house or the Cleveland place? A. Yes, sir.

Q. Did you know it in 1887 and 1888—three or four years ago? A. Yes, sir.

Q. Do you remember of the house being torn down? A. Yes, sir.

* * * * *

Q. During the past eight years have you known of that strip of land between the two lakes? A. Which strip?

Q. Between the two lakes—between Wolf and Hyde lakes? A. Well, I don't understand what you mean.

Q. On which Mr. Field lives? A. Yes, sir. Well, I have walked up there different times; I only crossed once.

Q. Do you know whether the water has extended over that strip between the two lakes? A. Yes, sir; it has.

Q. How often have you seen it so? A. Well, I don't know just how often I saw it. I have been to the house once, and of course, was not close to it. I was there different times to take a walk, but not to cross, the water being too high.

Q. Was the water all one between the two lakes? A. Yes, sir. The water was all one.

Re-direct Examination by MR. GREGORY.

Q. You do not mean that there was no land between the two lakes, but that it was simply high at the cut? Is that what you mean? A. Well, there was a walk there, of course, but the water had raised so you couldn't walk across it.

Q. So you couldn't walk from south to north across the cut? A. No, sir.

Q. That is where you say the water was high and all one? A. Yes, sir.

MR. DENT: Was that so up to the Field place? A. Quite a piece up.

ISAAC N. HARDIN, resumed, was further examined-in-chief by MR. DENT, and testified as follows:

* * * * *

Cross-Examination by MR. GREGORY.

Q. Mr. Hardin, I believe you testified, to some extent, as to conveyances, and what they operated to convey, in the chain of title which has been proved, to Mrs. Hardin, in this case, on your direct examination? A. Yes, sir.

Q. I will ask you to state whether, under the patent to John Holbrook, issued in 1841, Mrs. Hardin's claim extends on the west to the Calumet River? A. It does in 19.

Q. What is the western boundary in 30? A. The west half section line.

Q. The half section line of section 30? A. Yes, sir; that is for the northeast quarter.

Q. The north and south line—the north and south half section line you refer to? A. The north and south center line of 30 would be the western boundary of the northeast quarter of section 30—the northeast fractional quarter of section 30.

Q. What portion of the southeast quarter of 30—to what portion does her claim now extend in this suit? A. Her claim embraces all within the boundary on the south—the line between 30 and 31—and all that would follow by operation of law to the center of the lake.

Q. And the western boundary is what? That is, to what line does her claim extend in the southeast quarter as the western boundary? A. Are you speaking of the lands conveyed under the patent?

Q. No, I am speaking of the present claim made in this suit. A The claim made in this suit is this: There are two claims in the southeast of 30. We have acquired from Rand and Steele, owners of the west fraction, all that part of the bed of the lake attaching to their tract by operation of law east of a line between—

MR. GOUDY: If this is considered as evidence I want to object.

A. East of a line a certain number of rods east of their west line.

* * * * *

MR. GREGORY: Q. How much frontage is there on the Calumet River? A. Half a mile.

Q. That is all between— A. In 19.

Q. In 19? A. East fraction of the southwest of 19.

Q. Has the improvement of the river proceded up as far as that tract, Mr. Hardin? A. It has not.

Q. How near does it approach there; that is, how near has the government work been done to that point—any work, dredging or otherwise? A. I can state from general knowledge?

Q. Yes; I ask you in a general way. A. About half a mile.

* * * * *

Q. What is the lowest stage of water you have ever seen in these lakes—Hyde and Wolf lakes? A. Well, "stage"—that refers to what?

Q. Anything you see fit to make the comparison by? A. I have seen it in ponds, as I have testified. I can't say anything more. The ponds were shallow ponds—very shallow. That is that part lying west of what is delineated as Wolf Lake.

Q. When did you see the lake in ponds? A. As I have testified, the last time was a short time before the commencement of this present trial.

Q. You mean to say the water was not continuous from a point in the southeast quarter of 30 up to a point north of the east and west center line of 20? A. Yes, sir; that is just what I do say. I say that place was divided into ponds and mud holes.

Q. Have you ever seen the water in that condition in that lake before—as low as that? A. Not so low as that. I have seen it practically in the same condition once before, as I have testified.

Q. When was that? A. That was along about 1869, 1870 or 1871.

Q. I believe you first knew this locality, you say, in 1867? A. Yes, sir; about 1867.

Q. Has there been any tendency on the part of the water there to recede in that time? A. There has been a very great tendency. The water has become less and less to my observation each year.

Cross-Examination by MR. GOUDY.

Q. You signed that notice you just had in your hands in the capacity of president of the Cook County Canal and Dock Company? A. I did.

Q. Were you president at that time? A. I was.

Q. How long have you been president of the company? A. Since it was organized.

Q. Do you know when that was? A. I don't know definitely; it has been several years.

Q. Are you still president? A. I am.

Q. Are you also a stockholder in it? A. I am.

Q. What is the extent of your holding? A. Practically the entire stock.

Q. Just look at the paper I now show you and state whether those are the articles of incorporation, and state the object of the incorporation? (handing the paper to witness). A. I think these are the articles of incorporation.

Q. What was the object of the corporation as there stated? A. You mean as expressed in this paper?

Q. Yes, sir. A. "To construct, operate and maintain canals, docks, slips and wharves; improve yards and operate same, in Cook County."

Q. What is the amount of the capital stock? A. $50,000.

Q. How much of that stock did you subscribe for at that time? A. $49,500.

MR. DENT: I don't see the materiality of this.

THE COURT: I don't see it myself.

MR. GOUDY: I am cross-examining him, and I propose to show that he is interested in this litigation.

THE COURT: To show his interest?

MR. GOUDY: Yes, sir.

THE COURT: Very well, you have shown that.

Q. What was the amount of your stock, did you say? A. $49,500.

Q. You still hold that quantity, do you? A. I do.

Q. Did that corporation ever dig any canal? A. It has not.

MR. DENT: I don't see its materiality. I object to it.

THE COURT: I suppose you cannot attack its organization collaterally, can you?

MR. GOUDY: No, sir; I don't propose to.

Q. Has it ever done any business?

Objected to by Mr. Dent.

THE COURT: Answer that, whether it has ever been in practical operation.

A. What would I understand your question to embrace?

MR. GOUDY: Q. You are a very intelligent man and witness too. I ask you whether that corporation ever did any business. A. It has done business in the sense of completing its organization.

Q. Has it ever done any besides receiving the deed that was made to that company? A. It has never dug this canal.

Q. Has it ever done any business except to receive the deed which has been offered in evidence? A. Yes, sir; I think it has.

Q. What? A. It has kept up its organization.

Q. Have you had meetings? A. Yes, sir.

Q. How often? A. Quite often.

Q. That is all? A. That is all practically; that is, it has done no work on this tract.

Q. Was there any stock ever paid in?

Objected to by Mr. Dent.

THE COURT: I don't think it is material.

MR GOUDY: If he is liable to pay $50,000 over to this corporation I think it is material.

THE COURT: I don't see that it concerns you.

MR. GOUDY: No, it does not concern me, but it concerns his credit.

THE COURT: Nor the other parties to this suit.

MR. GOUDY: It concerns his credit, that is all.

THE COURT: What?

MR. GOUDY: It concerns the credit to be given him as a witness.

THE COURT: Oh, I think not, sir. I don't see how it could.

MR. GOUDY: If he is liable to pay on that stock.

THE COURT: Suppose he is. I rule the question out.

MR. GOUDY: Are you the husband of Gertrude H. Hardin, who is a party to this suit? A. I am.

Q. Have you any interest in the result of this litigation? A. I have.

Q. What is it? A. As a party in interest in the Cook County Canal and Dock Company, you have just stated; and I have the interest as the husband of Gertrude H. Hardin.

Q. You refer now to legal interest, do you? A. I don't care what you call it. I have answered your question.

Q. Have you any further interest in the case, in its conduct or in its result, than a legal interest in it? A. Why, I don't know that I understand your question, Mr. Goudy. I want to answer it if I understand it.

Q. Have you taken any part in the preparation of this case for trial? A. Oh, a great deal.

Q. You have been actively engaged in it ever since the litigation commenced, haven't you? A. For seventeen years.

Q. And ever since this present suit was commenced? A. Yes, sir.

Q. In short, you have prepared this suit for trial, haven't you? A. I would not like to state that.

Q. Well, haven't you substantially prepared it for trial? A. No; Mr. Dent has prepared the case for trial. I have assisted Mr. Dent, but I would not like to say that I have prepared this case for trial in Mr. Dent's presence.

Q. Your modesty forbids it? A. I beg your pardon.

Q. Your modesty forbids it, I suppose? A. No, my modesty does not forbid it, but the truth forbids it.

Q. Haven't you been in this court room during the progress of this trial? A. I have.

Q. Haven't you made continual suggestions to Mr. Dent, as counsel, as to the questions that he should propose to various witnesses? A. I have made many suggestions to him, but I would not like to state it "continually." Mr. Dent has made a great many suggestions which have emanated from himself.

Q. You have had charge of the papers in the case and arranging them and producing them when required, haven't you? A. Oh, to a certain extent—perhaps a large extent—yes, sir.

Q. Have not the maps that have been offered in evidence in this case by you, marked "Rossiter Exhibits," been prepared at your request and under your direction? A. They have not.

Q. Didn't you request the preparation of those maps? A. Not as they are presented, I did not.

Q. You requested the preparation of maps to be used in evidence in this case, didn't you? A. I requested the preparation of a map—

Q. You employed Mr. Rossiter to make surveys and take levels, didn't you? A. I did, in conjunction with Mr. Shedd. I employed Mr. Rossiter to ascertain the elevations of the bed of that lake, and the map-making feature of it was Mr. Rossiter's own suggestions as to the way he would present it.

Q. That is all, sir.

JOHN S. FIELD, a witness called on behalf of petitioner Shedd, being first duly sworn, testified as follows:

Direct Examination by MR. GREGORY.

Q. What is your full name? A. John S. Field.

Q. And what is your business? A. I am vice-president of the Knickerbocker Ice Company.

Q. They have icehouses at Wolf Lake? A. Yes, sir.

Q. How long have you been connected with the ice company? A. About fourteen years.

Q. Are you familiar, in a general way, with the Wolf Lake region there? A. Yes, sir.

Q. How long have you known that region? A. Since either the fall of 1878 or 1879.

Q. The water in Hyde Lake and Wolf Lake varies considerably in height at different times, does it not? A. Yes, sir.

Q. What has been, since you have been familiar with that region, the general tendency? For the water to encroach upon the land, or to recede? A. Well, from 1879, until about 1887, until an outlet was cut from Calumet River, we usually opened an outlet into Lake Michigan from Wolf Lake every spring, and the water then, until we opened it, was, my impression is, about two feet above Lake Michigan, and it would then assume the level of Lake Michigan, and the first north storm would close it up again.

Q. Close up the outlet? A. Close up the outlet. Frequently we have been obliged to open it two or three times during the spring.

Q. Well, you are familiar with the strip of land between Hyde Lake and Wolf Lake, are you, in a general way? A. Yes, I am.

Q. The question that I immediately desire to direct your attention to is whether that has been in the lapse of time increased in width, or growing smaller? A. Well, that has been increased. In about 1880 I attempted to drive to Hammond.

Q. Where? A. Across between the two lakes.

Q. From what point did you attempt to drive? A. Well, I could show you on the map—about where that figure 20 is, where we come from our icehouses.

Q. The figure 20 on this map indicates, approximately, the center of section 20? A. Well, that is about—I should judge that was about where I came from.

Q. You attempted to drive southwesterly on that strip of land? A. Yes, sir, and about from the point where it says "McDaid" to about the second name of "Field," it was impassable; it was nothing but water.

Q. What season of the year was that? A. That was in—I think that was in April.

THE COURT: April, 1880? A. I won't say exactly that that is 1880.

MR. GREGORY: Q. What effect, if any, has the deepening and

improvement of the Calumet had upon the size of those lakes? A. Well, the waters of Wolf Lake are now the same as Lake Michigan, less the time that it takes for the water to run out, or run in, as the lake varies with the wind.

Q. And the waters of Wolf Lake and Hyde Lake—I suppose the waters of those two lakes are generally at about the same level? A. Yes, they are exactly the same level, less whatever difference there might be in the distance that produced the current, that is all.

Q. The channel between those two lakes, at present, is obstructed, I believe, artificially? A. Yes. I caused that to be done.

Q. That prevents the water from flowing through there now? A. Yes, sir.

Q. That has been done since this trial commenced? A. It is only about two or three weeks ago.

Q. The stage of water in those lakes at present is very low, I believe? A. Exceedingly low. It compares with Lake Michigan, which is the lowest that it has ever been known.

Q. Now, were you down on this strip a short time ago with Mr. Rossiter and Mr. Shedd? A. Yes, I was.

Q. Do you remember investigating particularly the surface of the ground a little below the Condit house or the house where Smale lives? A. Yes, I remember that.

Q. There is a point there where there is a kind of a break in the ridge, is there not? A. Yes, sir.

Q. What did you find there as to the surface of the ground? A. Well, at that particular point we found a remnant of a corduroy road, or a brush road, that had been built across there.

Q. What was the effect of the brush road—to raise or lower the surface of the ground there? A. Well, that was to raise, of course, the surface of the ground. There had been a corduroy road put there, and on top of that had been put gravel or sand.

Q. About how much above the natural surface of the ground had that been raised in that way? A. Well, as I remember, it was from eight to twelve inches.

Q. I would like to ask you, Mr. Field, if, during the time that you have been familiar with this region, Wolf Lake is open into Lake Michigan? A. No, not unless we opened it.

Q. Have you ever known it to be opened naturally? A. No, sir; I never have, not since 1879.

Q. Was it at that time? A. No. That is as long as I have been familiar with it; since 1878.

Q. As long as you have been familiar with it, you have never known it to open naturally into Lake Michigan? A. No, sir.

Q. Do you remember in 1887 what the stage of the water was in the spring of that year? A. Yes, very clearly.

Q. Was it high or low? A. Exceedingly high.

Q. How high, if you know, above datum? A. Something like four feet above datum.

Q. Was it more or less than four feet? A. I think it was four feet and three inches.

Q. Were you there at the time and saw it? A. Oh, yes; I was there at the time and saw the high water. I was there daily.

Q. Did it come up near to your buildings? A. Yes, it came up on some of our buildings, up above the weather-boarding.

Q. You have a store there and other buildings besides the ice house? A. Yes, I have been familiar and built everything there; have been constantly there up to two or three years ago daily.

Q. When the water was at that height, Mr. Field, how would it leave the strip of land between the two lakes—how would it affect that in a general way? A. Well, I should say that from about the second name "Field," up to possibly that section line this side of 20, it would be covered, and there might be other points between that. There would be a very small strip of land there. There would be places even longer further up, that it would be impossible for two teams to pass.

Q. How would it be at that depression, where you say you found the corduroy road? A. Do you mean in the ridge, or where the road was?

Q. I mean at this depression where the road was below Smale's house, if you saw the strip and measured it? A. No, sir; I didn't look at that at that time; I was very busy trying to pick my way across there with a team at that time.

Q. I refer now to the time with the water four feet and three inches, if you did notice how it left the strip. If you did not notice it, why, of course, you can't say? A. No, sir; I couldn't say.

THE COURT: You did not notice it? A. No, sir.

MR. GREGORY: Q. You did not see it yourself? A. I did not see it with any idea of testifying as to what it would be.

THE COURT: You did not notice it particularly? A. No, sir; no more than I would notice in trying to drive across there.

MR. GREGORY: You didn't try to drive across there with the water four feet and three inches above datum, did you? A. No, sir; the year it was four feet and three inches above datum was 1887. I was across there in 1880.

THE COURT: He is talking about 1880, and you are talking about some other year. Is that all you say, you did not notice particularly in the spring of 1887, when the water was so high? A. No, sir; in the spring of 1887 I did not notice particularly how that was. The only time I noticed the strip was when I drove across there in 1880.

Cross-Examination by MR. DENT.

Q. Was the strip narrower at that time? A. When do you mean, sir; in 1880?

Q. Yes. A. Yes.

Q. This is a season of low water at the lakes there, I understand you to say? A. Now?

Q. Yes? A. Yes.

Q. How is Hyde Lake now? Is it up as high as Wolf Lake? A. Well, about three days ago it was twelve inches lower, on account of the obstruction that we had put in there.

Q. How is it as to being one body, or being divided up, do you know? A. Before the outlet they were both about the same height.

Q. Whether Hyde Lake is one continuous sheet of water? A. I haven't noticed that lately; I couldn't say. I have seen it for a great many years from the top of our ice houses, and then it looked to be all water; the whole country did, in fact.

Q. Sometimes both lakes together? A. Yes, nearly so.

Q. What makes the water in Wolf Lake higher now than the water in Hyde Lake?

Objected to by Mr. Goudy as not being cross-examination; also objected to by Douthart as immaterial; objections overruled.

A. On account of an obstruction that we put across the outlet to hold the water in Wolf Lake, and the natural rains, etc., have raised Wolf Lake. I said we had placed an obstruction across the lake, and the rains have raised Wolf Lake, and we had held it in by this obstruction.

Q. Have you also pumped water in Wolf Lake? A. Yes, sir; we have been pumping for seventy days.

F. C. ROSSITER, recalled on behalf of petitioner Charles B. Shedd, testified as follows:

Direct Examination by Mr. Gregory.

Q. Mr. Rossiter, did you go down onto this strip between Wolf and Hyde lakes recently and examine a kind of depression or break in the ridge, a few hundred feet south of Smale's house? A. Yes, sir.

Q. How long since did you make that examination? A. It was November 14, 1891.

Mr. Douthart: I object to the condition of the ground the 14th of November, 1891.

Mr. Gregory: I was about to ask the witness what he found to be the condition of the ground there, and whether he found any artificial conditions there that would tend to raise the ground, and if he took any levels, and what they were. I think it perhaps is material to show that there was a natural depression over which the water would flow at certain stages.

The Court: There is no doubt from the evidence that there is a natural depression there, but whether the water would flow through there, I don't know whether this would tend to prove? A. It will tend to prove that the water was above datum, and it will show whether the ground was raised artificially.

The Court: Does he know when it was raised?

Mr. Gregory: No, but he can tell what he found there.

The Court: I will receive the evidence.

MR. GOUDY: The court understands it was only two weeks ago?

THE COURT: Yes, I understand.

MR. GREGORY: You may state what you found as to the surface of the ground, as to whether there was anything added to raise it above its natural level and whether you took levels? A. There is or was an old corduroy road. This corduroy road is in the depression or at the east side of the depression. The corduroy is still to be seen. In the center it was covered with three to six inches of earth.

Q. How much does the top of the corduroy and earth raise the natural surface of the ground there, or the surface of the ground above the natural surface? A. Well, from three to six inches, I think, above the natural surface.

Q. Did you take any levels through there? A. I did.

Q. What levels did you take?

MR. DOUTHART: I think the witness has been over this and testified to this question.

MR. GREGORY: I don't think he did—not to the levels made at that time.

THE WITNESS: On the corduroy road the elevation is 2.49 above city datum. North of the corduroy road it is 2.3. I have taken two places on the corduroy road. The other place was 2.34 above city datum, and north of the corduroy road was 2.3.

Q. What is the general course of the depression there through the ridge? A. The direction is nearly north and south, bearing a little to the southwest and northeast.

Q. Then water at about two and one-half feet would pass through there, would it not? A. Yes, sir.

Q. You dug down to the corduroy in several places, did you not? A. Yes, three places.

Q. There is one more question. You testified as to how much land there would be in certain stages of water in the southwest of 20. Did you survey that in 1885? A. Well, about that time I did.

Q. I have got a memorandum of a plat here—I do not care to put it in evidence unless you wish to have it—noting a survey February 26, 1883. I will ask you to look at that and refresh your recollection, if you can, from it, and state at what stage of water that is taken? A. I do not see anything noted on here as to the stage of water,

Q. Was that a representation of the water as it stood at that date? A. Yes, it was.

Q. Can you state what at that time was the quantity of land in the southwest quarter of 20? A. It was 4½ acres in one tract and 10¼ in another—4½ in one tongue of land and 10.26 in the other—4½ in the western tongue and the other is 10.26.

Q. Is that in addition to the 4.53 acres that was bounded by the original lines of the meander? A. Yes, sir.

Q. How about there being water in this natural depression at

that date, was there or was there not? A. There was water in this natural depression.

Q. Referred to already? A. Yes, sir.

Cross-Examination by Mr. Bennett.

Q. Mr. Rossiter, why didn't you take levels on the south side of the road at this point you are speaking of, south of Smale's? A. I testified that the land was 2.3 south of the road.

Q. But in these last levels you took?

The Court: November 14th? A. The reporter says I said north twice. but I intended to say south once. It was 2.3 south.

Mr. Bennett: Now, Mr. Rossiter, isn't there a clump of bushes on the south side of the road right up by the road? A. I think there is, very close to the lowest place.

Q. Have you examined the levels taken by Cole on Jordan's "Exhibit C" in that locality? A. I have, but I do not remember now what they are.

Q. I do not ask you what they are. Do your levels differ with those levels in that locality? A. That is a thing I don't know.

Q. Is your bench mark higher or lower than his? A. That I don't know.

Mr. Gregory: We offer some other depositions, taken on the 19th of December, 1889, at room 33 Montauk Block, before William H. Allen, Notary Public, for petitioner Shedd.

Depositions of William Farnsworth, Nellie Farnsworth, Frank Chandler and William Gardner, examined before William H. Allen, Notary Public, Chicago, Illinois, on December 19th, 1889, on behalf of petitioner Charles B. Shedd.

Deposition of WILLIAM GARDNER who, being duly sworn, testifies as follows:

Mr. Strong: Q. Where do you live? A. Hegewisch.

Q. Is that near Wolf Lake? A. Yes, sir.

Q. Do you know the house where William Barnes lives now, formerly occupied by Solomon Field? A. I do not know that house that William Barnes lives in now.

Q. William Bush? A. Yes, sir.

Q. Where Field used to live? A. Yes, sir.

Q. You are acquainted with that house? A. Yes, sir.

Q. Was the house ever occupied by William Barnes? A. I do not know whether or not. One time Mr. Barnes was living with Mr. Field.

Q. In that house? A. Yes, sir.

Q. Who lived in the house after Barnes? A. I do not know.

Q. Do you know a man by the name of Fogli? A. Yes, sir.

Q. Did he live in that house? A. He lived in that house.

* * * * *

Q. When you left Wolf Lake where did you move to? A. I moved to Colehour. When I left there Mr. Field was in the house.

Q. When was that? A. I guess that was in 1881, I believe.

Q. After Fogli moved out was the house vacant at any time to your knowledge? A. Yes, sir.

Q. Who moved in next after Fogli moved out? A. I do not know who moved in next. The next I know that lived there was Mr. Chandler. I do not know whether any one was there before or not.

* * * * *

Q. Did you think of living in the house at one time? A. Yes, sir.

Q. Was it vacant at that time? A. Yes, sir,

Q. Did you have a lease from anyone to the house? A Not that I know of; I suppose I did.

Q. From whom? A. From Bennett's son.

Q. Did you live in the house? A. No, sir.

Q. Before Fogli lived there did you know of the house being vacant at any time? A. No, sir.

Cross-Examination by MR. WILLOUGHBY, counsel for defendant Conrad N. Jordan.

Q. You say you had a lease from Frank Bennett? A. I do not know whether his name was Frank or not; it was Bennett's son.

* * * * *

Q. You did not take possession of the house under this lease? A. No, sir; I went and cleaned the house up, and waited a few days until the water was low down, so I could cut hay on it; the water did not go down, and I did not cut any hay, and did not go into the house.

Q. What is the fact? A. The fact is that I did not take possession of the house.

* * * * *

Q. When was it? A. I think it was in 1883.

Q. What part of the year in 1883? A. I think it was about along June; the latter part of June.

* * * * *

Cross Examination by MR. SWETT.

* * * * *

Q. Did you know a place known as Reese's place? A. Yes, sir; Charlie Reese.

Q. Do you know where he lived? A. Yes, sir.

Q. Did you ever live in that house? A. Yes, sir.

Q. When? A. I lived there when Reese lived there.

Q. Do you remember the year? A. That was before he moved where he is now—near Grand Crossing. It was a year or two, I believe, after the Chicago fire.

Q. How long did you live there with Mr. Charlie Reese? A. I cannot tell exactly.

Q. Just about how long? A. I lived there pretty much all summer—pretty much all one summer, at the time of the Chicago fire; I lived with him in May; I went there then, and I lived all that winter, and part of next summer.

Q. How far was the Reese house from Wolf Lake on the east?

MR. BENNETT: Objected to as not proper cross-examination, and as having no tendency to show whether the Field house was vacant, or when it was vacant.

A. I guess it was—I could not tell exactly, but 200 or 300 feet away; I think a couple hundred feet.

Q. How far was the water on the other shore west of the house—what is sometimes called Hyde Lake?

MR. BENNETT: Objected to for the same reason as before, and without making specific objection to each question, please note my exception to this class of evidence. I want it understood that each question is objected to.

A. I could not tell exactly; maybe 500 or 600 feet, where you would strike the water.

Q. How far was the water north of the house—how near did the water come to the house on the north? A. I could not tell exactly; there is a little ridge of timber there; I do not know how far it is; there was an outlet there.

Q. How far north of this outlet was the Field house? A. I could not tell exactly; it was pretty near the same distance. I guess about 600 or 700 feet south of the Field house. That is what I think; I do not give it to you for the truth, but it is what I think.

Q. I understood you to say you took the lease of Bennett for the Field house? A. Yes, sir.

Q. In 1883? A. Yes, sir. I think it was in 1883.

Q. Why was it you did not go into that house? A. I went and cleaned the house; the water was high, and it did not go down; I wanted to make hay, and the water was too high, and I did not go into the house. I went to Chicago and found a job to go to work for the government.

Q. You did not go there to live? A. Yes, sir.

Q. You did go there and clean the house? A. Yes, sir; but I did not move into it.

Q How near up to the house was the water when you went there to clean it?

Objected to as being improper cross-examination.

A. It was not very far.

Q. About how many feet should you think? A. There was a little raise of ground to walk on there to go to the house, and there was a hole in the floor, a trap door, to get the water out to scrub the floor with, and we took the water from there to clean with.

Q. There was water under the floor and you dipped the water

out? A. Yes, sir; with a pail to wash the floor with; there a trap door there which was opened.

Q. There was a little path leading up to the house? A. Yes, sir.

Q. Did the water come up to that path? A. It came pretty near to it; it was very soft.

Q. About how far was the water distant from the house? A. On the west end of the house it was about three or four feet.

Q. And on the east side it was about how far? A. On the east side it was a little higher; there was little more of a raise.

Q. It did not come quite so near? A. No, sir. Field was filling up a little there all the time when he had time.

Q. How near did it come? A. There was no water there on top of the ground; there was plenty of water at the head of the lake close to the house.

Q. On the north of the house how near did the water come? A. The water was right close by on the north of the house—right close by the barn.

Q. How far was the barn from the house? A. About twenty-five or thirty feet.

Q. How far was the water from the house on the south? A. On the south it was, I guess, about five or six feet.

Q. How deep was the water covering the ground around the house? A. Around the house it was not very deep. If you go a little way from the house it was deeper.

Q, Looking off to the north from the house what did you see? A. It depended upon which I was looking at.

Q. Did the water cross over north of the house, so that it was a sheet of water? A. Not at that time; when I had the lease the grass was that high.

Q. Did the grass grow up through the water? A. Yes, sir.

Q. Have you ever seen the water clear across there, from one lake to the other? A. Yes, sir; I crossed it in a boat.

Q. Have you frequently been across there in a boat?

MR. BENNETT: The last two questions specifically objected to as irrelevant, and not proper cross-examination.

A. I was across there a few times; I do not know how many times.

Q. Could you row right across? A. When I hunted I never rowed about; I pushed the boat; I poled it.

Q. What do you mean by poling? A. I stood in the stern of the boat and pushed it with a pole.

Q. I understand you crossed from one lake to the other in that way a number of times with a boat? A. Yes, sir.

Q. How deep was the water? A. At the shallowest place it was about a foot deep.

Q. At the time when you crossed there in a boat, how near did the water come up to the Field house? A. When I crossed there with a boat it was not very far from Field's house.

Q. How far north of the Field house did the water extend? A. It was between the ridge of timber and what we called Elm Island, where the house was. We used to call it that to people who hunted there.

Q. Where was it you called it Elm Island? A. It was where the Field house stood.

Q. Was it commonly called Elm Island? A. We called it so; I do not know whether it was called so generally or not.

Q. I understand you to say that the water extended from Elm Island to the woody ridge?

MR. BENNETT: Objected to as leading and not cross-examination, and therefore improper.

MR. SWETT: Q. You testified that the water extended north from Elm Island to the woody ridge? A. Yes, sir; on the north side.

Q. About how far was it from Elm Island to the woody ridge? A. May be half a mile.

Q. That was all covered over except where the grass grew through? A. Yes, sir; in the spring of the year, in high water. In the spring of the year water is always generally high.

Q. Have you ever been up on that woody ridge you speak of? A. Yes, sir.

Q. How close in high water times would the water come to the ridge on the south? A. It came pretty close to the trees.

Q. About how many feet? A. I could not tell you exactly; not a great ways when the water was high.

Q. How far would the water be from those trees on the east? A. You could almost get to the ridge on the east ride.

Q. In a boat? A. Yes, sir; of late years you cannot do it any more.

Q. How near to the trees could you get on the west of this ridge in a boat? A. On the west at some places you could get close to the woody ridge, and at some places you could get within ten feet.

Q. How wide was this woody ridge where the timber was? A. At the time I was speaking about you could come pretty near both sides of the ridge.

Q. About how many feet was that ridge? A. It was about 200, 300 or 400 feet wide, I should think; the south end of it is narrow; it is three or four trees wide; it comes to a kind of a point there.

Q. Do you mean that the strip of timber was 400 feet wide in some places, or that the ridge was 400 feet wide? A. No, sir; I mean the ridge.

Q. Was that ridge, all but the portion of it that is covered with timber, ever covered with water? A. Not that I know of.

Q. I asked you awhile ago how far the water came from the trees, and you said, as I understood you, three or four feet on one side and about ten on the other—did you mean that? A. Yes, sir.

Q. In the time of high water, when the water came up within a few feet, as you say, of the Field house on the south, could you or could you not cross from one lake to the other in a boat? A. No, sir.

Q. How deep would the water be south of the house? A. The water south of the house would be about—not now, for the road is raised there. Mr. Field raised the road, but in that time if there was water, from where the building is, you could go anywhere with a boat. Mr. Field made a raise there when he first went there. He undertook to make a road to that ridge.

Q. You mean the reason you could not cross with a boat there was that Field had thrown up a road? A. Yes, sir

Q. Before that road was thrown up you crossed anywhere with a boat in times of high water? A. Yes, sir.

Q. Have you ever crossed there? A. Yes, sir.

MR. BENNETT moved to strike out all the evidence relating to the height of the water on the land in question as being irrelevant and improper cross-examination; also all evidence in relation to the alleged lease, because it appears from the evidence of the witness that the same was not signed.

Re-cross Examination by MR. WILLOUGHBY.

Q. You say you crossed at different times from Wolf Lake to Hyde Lake, and from Hyde Lake to Wolf Lake, both—whereabouts did you cross when you made these crossings? A. I crossed on both sides of Elm Island, where the house is built on now, but not these last years.

Q. You crossed both sides of the Field house? A. Yes, sir.

Q. When did you first cross from one lake to the other in a boat as you stated here? A. About twenty-five or thirty years ago.

Q. Where were you living then? A. I was living with Reese then.

Q. Do you recollect the first time you crossed over in a boat? A. Yes, sir.

Q. Who was with you? A. Myself.

Q. How far did you cross and where did you go? A. I went often back and forth, excepting through the timber. You could have gone through the ditch if you wanted to. I thought I would take a short cut.

Q. The first time you remember crossing from Wolf to Hyde and from Hyde to Wolf lakes, did you cross by pushing the boat over the land? A. Not over the land. Over the water.

Q. Where did you make the crossing the first time? A. Anywheres there.

Q. Where did you make it in point of fact? A. Anywheres between the ridge of timber and the ditch.

Q. Do you remember distinctly the first time you crossed? A. Yes, sir.

Q. As distinctly as the other times that you crossed? A. Yes, sir. I remember the first time I was there.

Q. What year was that? A. I call it about twenty-five years ago. You can figure out what year it is.

Q. Was it before or after the fire? A. Is it twenty-five years ago since Chicago burned?

Q. You do not know whether it was before or after? A. It was thirty years ago. Has Chicago burned thirty years ago?

Q. How long was it before Reese moved from there that you made this crossing from Wolf to Hyde Lake? I want you to answer my question. A. I suppose I will if I want to.

Q. I want you to answer my question? A. I want you to do it in a decent way. You do not ask me if Chicago burned thirty years ago.

Q. I asked you if this took place before the Chicago fire? A. I told you that it was about twenty-five years ago.

Q. How long was it before Reese moved from there that you made this first crossing? A. Charlie Reese had no house there at that time.

Q. How far is it from Wolf Lake to where William Reese lived then? A. I do not know; the nearest one is Joseph Phillips. I suppose about a mile and a half or two miles; maybe only a mile, for all I know.

Q. This was a time you crossed when the water was high? A. We had high water since

Q. That was a time of high water when you made the first crossing? A. We had high water since then; most everything was high water at that time.

Q. You say the time you made this first crossing, twenty-five or thirty years ago, at that time it was not specially high water? A. No, sir.

Q. There was no trouble in crossing in a boat at that time, whether the water was high or low? A. Yes, sir; at any time.

Q. You could cross at any time on that land? How far from the Field house—now stands to the north—could you cross almost any time in a boat? A. A little ways from where the house is, commencing on Elm Island, where they put the house on.

Q. Commencing a little distance to the north, what is now the Field house, or where the Field house now stands, how far to the north could you cross almost any time in a boat? A. About, I suppose, twenty, twenty-five or thirty feet; somewhere along there; maybe more; maybe forty feet.

Q. You say the first time you crossed there was twenty-five or thirty years ago—how long had you been living at William Reese's then when you crossed the first time? A. That winter; I lived with him all winter, and then off and on before that.

Q. How long after you went to live with him was it you crossed there the first time—the next spring? A. Yes, sir.

Q. Can't you fix definitely the time you went to live with William Reese—you say it was twenty-five or thirty years ago—

was it twenty five or thirty years ago? A. I cannot tell; it was somewheres along there.

Q. Will you mention any year that you crossed in a boat over this land from one lake to the other? A. I cannot mention no year. I only can come pretty close. I cannot mention any particular year, because I do not remember.

Q. When you speak of crossing, what do you mean? You went from one lake way over to the other, or went from one lake part way over to the other? A. From one lake to the other, going to both lakes.

Q. How many times do you suppose you had done that? A. I do not know.

Q. You cannot fix any particular year when you ever crossed? A. No, sir.

Q. Was anybody ever with you when you crossed over in a boat that way? A. No, sir.

Q. Wasn't there a ditch running from one lake to the other when you lived there? A. There was.

Q. Why didn't you run through that? A. Because if I can shorten my route 200 or 300 feet I do it when I go anywheres.

Q. It does not require very much water to move a boat? A. No, sir.

Q. How much water does it take? A. I can go with my boat in four or five inches of water anywhere.

Q. You say you crossed there until the Field road was built? A. Yes, sir; before he built the road I crossed there.

Q. After that, you say, you could not cross? A. No, sir; I did not try.

Q. Where was it the road prevented you from crossing? A. He raised it from the outlet clear up to the ridge of timber, so that we could go there with a wagon.

Q. Taking it for forty rods south to the McDaid's place, was there anything there to prevent you from crossing there in the shape of this road? A. No, sir; there was nothing to prevent there; only the fence, but there was a gate left there to go through.

Q. Was there any road there to hinder you from crossing south of McDaid's place? A. Not that I know of; I did not try to go there.

Q. It was in 1883 when this lease was prepared? A. I think it was.

Q. You did not go into the house on account of the water being too high? A. Yes, sir; the water was too high. I could not make any hay and did not go in.

Q. That was in June? A. I think it was the latter part of June.

Q. Do you know whether the mouth of Wolf Lake was closed? A. I do not know if it was; I know when I lived there me and Mr. Field and Phillips went to open it. We opened the mouth of Wolf River several times.

Q. Do you know whether at that time the mouth of Wolf Lake was closed or not? A. I do not know.

Q. You took no measures to ascertain about it? A. No, sir. I know me, Phillips and Field opened it four or five times.

Q. I suppose that this boat you pushed across it was a little flat bottom boat? A. Yes, sir.

Re-cross Examination by MR. SWETT.

Q. With reference to the general condition of this water twenty-five or thirty years ago, when you first say you crossed there in a boat, how was it in comparison with the water at the present time—was it higher or lower generally?

MR. BENNETT: Objected to for the same reasons given before. The question as to the condition of the land with respect to this water is not a proper legitimate cross-examination.

A. The water at that time was such that you could go most anywhere. On Hyde Lake you could go pretty near to Bill Reese's house at that time; now you can cut hay there with machines and everything.

Q. Then all throughout the country through those lake regions the water was higher than it is now? A. Yes, sir; considerably. It is drained awfully fast now—every year.

Q. You testified in reference to the road that Field threw up that prevented you from crossing there from one lake to the other in a boat—which side of the house, north or south, do you wish it to be understood that that road was? A. He filled the road from south to the north of the house, to the point of timber from the outlet, so as to be in a condition for teams. He put a bridge on the outlet.

Q. That is from the outlet north to the house? A. South of the house.

Q. Did not Field also try to build a road north of the house? A. Yes, sir.

Q. How far north of the house did he build this road that he attempted to throw up? A. He threw it up from the outlet clear to that ridge of timber; he took a good bit off with a wagon.

Q. I mean, did it run north from the house? A. That is what I say, to the timber ridge there.

Q. How did he build the road? A. With oxen; he tore the sod with an old plow he had there, and an old scraper, and scraped sand and dirt, and kind of threw it up together. He had a yoke of oxen.

Q. Did you help build that road? A. No, sir. I was there looking at them. I thought at one time that he was not going to do that work for nothing; I thought at one time he was paid by the town.

Q. While living at Reese's, did Field live in the house called the Field house at any time? A. No, sir.

Q. Where were you living at the time Field was living in the Field house? A. I was living in the house that they used to call

Buckshaw's, and then Judge Hager bought it from Buckshaw. It was twenty acres. I went to live in that building which was next to Joseph Philip's.

Q. How far was that from Field's place? A. I guess it was a mile; maybe a little over.

Q. Were you ever down at Field's house when he lived there? A. Yes, sir; I worked for him.

Q. What year, do you remember? A. I can not remember.

Q. Field lived there a number of years, I suppose? A. Yes, sir.

Q. What did you do for him? A. I cut hay for him.

Q. Whereabouts? A. On the north end of the outlet—on the west side.

Q. Did you ever cross this land from one lake to the other during any of the times that Field was living there? A. No, sir.

Q. When you made these crossings that you speak of, was it not the time that Field lived there? A. Nobody was thinking about living there.

Q. You never have been there since Field lived there? A. No, sir.

MR. STRONG: Have you seen the land overflowed between the two lakes since Field lived there? A. You could see the road, and there were dry places here and there.

MR. WILLOUGHBY: Have you had any conversation as to what you were going to swear to to-day before you gave your evidence on the witness stand? A. No, sir.

Q. Did you have any conversation with Mr. Hardin as to what you were going to swear to to-day? A. No, sir. I have not seen him since he had the trial with Bennett, four or five years ago.

MR. STRONG: When you came in this morning, about half past nine, did I not ask you some questions about the lake? A. Yes, sir; I thought he meant previous.

MR. SWETT: Before you got on the stand, did Mr. Hardin ask you any questions this morning? A. No, sir.

Q. Did I ask you any questions? A. No, sir.

Q. How long since is it you saw Mr. Hardin? A. Not since he had the trial with Bennett about land before in the United States Court.

MR. STRONG: Did you ever see me before? A. Not that I know of.

Q. I did ask you some questions as to what you knew about the position of the lakes? A. Yes, sir.

AMBROSE V. POWELL, called as a witness on behalf of the defendant Jordan, was duly sworn, and testified as follows:

Direct Examination by MR. GOUDY.

Q. What is your business? A. Civil engineer.

Q. In what connections have you pursued your business in the

last ten years? A. I was Assistant Engineer of the Chicago and Western Indiana Railway; Engineer of the South Chicago Dock Company; Engineer of the Calumet and Chicago Canal and Dock Company; Superintendent of Public Works of the Village of Hyde Park.

Q. In the course of your business have you had occasion to become acquainted with the country in Hyde Park, the southeast part of it, in the vicinity of Wolf and Hyde lakes, and between that and Calumet Lake? A. Yes, sir.

Q. What were you engaged in in the winter of 1881 and 1882—what work? A. Construction of the Hammond extension of the Chicago and Western Indiana Railway.

Q. Where did that run, having reference to the map before you, "Jordan's Exhibit A"?

MR. GREGORY: I don't understand this. Mr. Bennett told me he wanted to prove right in the same connection what Mr. Slataper testified to.

MR. GOUDY: It is rebutting testimony.

Q. Where is the location of that road? A. It starts from the southerly line of section 31, at the Illinois and Indiana state line, or where it joins Thornton, and runs up through 31, and then through 30 and 29, and then off through 13, the north and south half, the boundary line to 95th street and Stony Island.

Q. Had you occasion to observe the stage of the water during the winter of 1881 and 1882? A. I had, sir.

Q. Was it high or low at that time? A. Comparatively high, sir.

Q. Were there any special causes for high water in Hyde Lake, Wolf Lake, or in that vicinity that winter, and if so, state what? A. Well, continued rains had raised the water of Calumet River, causing an overflow there.

Q. To what extent was the country west of Hyde Lake and southwest of Hyde Lake covered with water? A. Well, westerly of Hyde Lake and southwesterly, including the territory south of the north line of section 25, was pretty generally inundated, excepting the higher or highest of the ridges. Late in the fall of 1881, I located the bridge across the Calumet River, near the west line of section 30, and at that time the ground was under water as far as you could see. There was one little place near Chittenden bridge, so called, on the main road, that was out of the water. Then the line running south from there—east, after it turns east, was pretty generally submerged, until we got down nearly to the Indiana state line. East of that the water extended through the sloughs over to Wolf Lake, or to Hyde Lake, which is the nearest.

Q. In what direction, in that season, did the water flow? A. It flowed from the west easterly and northeasterly.

Q. What was the stage of the water in 1883? Spring of 1883? A. The spring of 1883 I am not so positive about, as I was not in that location.

Q. In 1884, how was it then? A. In 1884 the water was very high west of the railroads.

Q. Were there any special causes for it that season? A. Any more than a heavy fall of snow, which went off quickly, made a flood in the spring, but it didn't extend to any very great extent east of the railroads—the railroads forming a dike there that shut it off.

Q. In 1887, what was the condition there? A. In February of 1887 was a period of extreme high water.

Q. Were there any special causes for it? A. A heavy snow fall accompanied by rains and warm weather.

Q. Did the ice affect it any? A. The ice affected the upper river to a certain extent, but not the lower river. That is, what I mean by the upper river, speaking of the upper river above Riverdale bridge, the west line of the Town of Hyde Park, but the lower river had all of the outlet which the railroad bridges would give it at that time.

Q. In what direction did the water flow in 1887? A. Northerly and easterly.

Q. Flowed into Hyde Lake, did it? A. Yes, sir; into Hyde Lake.

Q. Now, were those years that you have mentioned exceptional as to high water? A. They were in my experience.

Q. You may state if you know any other facts in regard to the condition of high water in the summer of 1887? A. In the spring of 1887?

Q. Spring of 1887? A. Well, I don't know that I understand exactly your meaning.

Q. What was your position that year? A. I was Superintendent of Public Works of the Village of Hyde Park.

Q. How was your attention attracted to the condition of the water? A. Among other things, I had charge of the maintenance of the bridges over the Calumet River, and my attention was particularly called to the height of the water in the river at that time, by its height at Riverdale bridge which we came very near losing from the effect of it, and on or about the 15th, about the middle of the month, I think, we had the trouble up there. Then at that time the water was, my recollection is, about nine feet above city datum, at the Riverdale bridge. Some weeks after that, I again had trouble from water flowing north through a ditch cut along Stony Island, and at that time it threatened to cover the territory north of it and surrounding Grand Crossing, and I was obliged to build a dam across this ditch in order to turn the water back through its proper channels by way of the railroad bridges, under the Chittenden bridge, or keep it in its channel, and also to prevent its overflowing the territory around Irondale. At that time I took levels at 95th street and the Calumet River; also at 95th street and Stony Island, one being the level of the water in Lake Michigan, and the other of the water in Calumet Lake, and I found the difference substantially three feet. It was a

fraction of a tenth either one way or the other, highest in Calumet Lake, and the height, if I recollect, in Calumet Lake, was 6.3—or some hundredths.

Q. How was it in Hyde Lake? A. Well, I did not take the elevation of the water in Hyde Lake. The water in the Calumet River, however, at the mouth, which was substantially that of Lake Michigan, was 3 plus, making a difference of about three feet between the two.

Q. At Chittenden bridge, did you take any level there? A. At Chittenden bridge, no, sir.

Q. Did the water flow in or out of Hyde Lake? A. It was flowing into Hyde Lake. I was down through over the line—there is two or three openings under the railroad tracks, and under the roadway, and through those openings the water was flowing towards Lake Michigan or towards Hyde Lake.

Cross-Examination by Mr. Gregory.

Q. When was it that this occurred? What year? A. In 1887. I think it was the spring of 1887.

Q. February, I think you said? A. I think it was February; yes, sir.

Q. They had floods within the then city limits of Chicago, did they not? A. I don't remember as to that.

Q. Do you remember that they had high water all over the country that spring? A. Yes, sir.

Q. Cincinnati, and other points? A. Well, I don't remember as to that, but I should presume the same causes would produce high water.

Q. There was a considerable accumulation of snow, and it went off rather suddenly in February, along about the 9th of February, and was followed by heavy rains, was it not? A. Yes, sir; that was the condition.

Q. And the ground was, in a large measure, frozen at the time? A. Yes, sir.

Q. So it made a sudden accumulation of water in all low places? A. It did.

Cross-Examination by Mr. Dent.

Q. Were you over at Hyde Lake at these times, Mr. Powell? A. At the times of which I have testified?

Q. Yes, sir. A. In 1882 I was along what is known as the Indian Ridge road, and that skirts Hyde Lake as near as there is anything down there, and I went over the line.

Q. How near did Hyde Lake come to the Indian Ridge road at that time? A. My impression is that there was quite a strip of territory towards the northern end of the Indian Ridge road that was under water from the Calumet River clear over as far east and north as you could go. I think there was a strip through there. I remember at one time—whether that was the time or not, but I think it was—that the water was running across the road there. I

know in 1886, or in 1887, that it did flow across there, so that I had to go and raise the road afterwards where it had washed out.

Q. My question was how near the water of Hyde Lake was to the Indian Ridge road? A. That would have been flowing across the Indian Ridge road at that point.

Q. The water came up close to the ridge and in places flowed across it? A. That is, it flowed from the river across into Hyde Lake in that direction. It was flowing towards the east.

Q. How close was the water of the lake to the Indian Ridge road? A. Well, I can't give you a definite answer as to that.

Q. Did it come up pretty close to the road? A. At places I remember it came up pretty close to the road.

Q. And it was one sheet of water all the way across to Wolf Lake, wasn't it? A. I don't know as to that. I could not testify.

Q. Did you see the water flowing into Hyde Lake or the Calumet from the district west into Calumet River? Did you actually see it flow? A. I don't think that I have, excepting at these times seen the water flowing across there.

Q. You did not, then, in 1887, see the water flowing into Hyde Lake? A. Yes, sir; I did, in 1887.

Q. In 1887? A. Yes, sir.

Q. Where? At what point? A. Through the openings which were left in the street; that Indian Ridge road, and also the other road running down, had culvert openings through them, and through those openings the stream was flowing in that direction.

Q. What road do you mean now? A. I mean Indian Ridge—what I know as the Indian Ridge road. It is this road running along here (indicating on map), down the Indian Ridge. Now, there is another road known as the Chittenden bridge road which runs on the west side of this slough coming down here (indicating), and I was speaking of those roads collectively.

Q. Did you see the water in 1887 flowing into Hyde Lake from the west in more than one place? A. Through those openings, yes, sir.

Q. Two openings? A. Oh, there is two or three, I don't remember the number. I have not thought of it since any more than I was down there to look to the protection of the road.

Q. What do you mean by openings—speaking of 1887? A. Bridges had been thrown over the low places along there on the road, which I suppose are there still—I have not been over them in some time. Through them the water was allowed to flow. Provision had been made for it flowing through there, evidently.

Q. There was a cut, wasn't there, between Calumet River and the lake at that time? A. No, sir.

Q. Don't you think there was a channel cut then? A. My recollection is that there was not.

Q. But your recollection is that there were some bridges over low places? A. Yes, sir. Those bridges are of a very old date—the construction of them.

Q. And that provision had been made for allowing the water through under these bridges, and that the water was running under these bridges into the lake? Is that your recollection? A. Yes, sir.

Q. Do you mean to say that the railroad cut or opening had not been constructed then between Hyde Lake and— A. I don't mean to say that it had not. I don't know whether it had or not.

JOSEPH M. SPAHN, called as a witness on behalf of the petitioner Shedd, was duly sworn and testified as follows:

Direct Examination by MR. GREGORY.

Q. Where do you live? A. Corner of 103rd and Indiana Boulevard, Colehour.

Q. Are you familiar with the country around Wolf and Hyde lakes? A. I am.

Q. The strip of land between the two lakes? A. I am.

Q. How long have you known that region? A. About thirty-two or thirty-three years. Probably longer.

Q. Are there fish which can be used for food in those lakes?

MR. GOUDY: What has that got to do with this title?

MR. GREGORY: It may have a good deal to do with it.

THE WITNESS: There is.

Q. Have there been as long as you have known the region? A. There have.

Q. And are there game birds in season on the lakes? A. Such as ducks and geese and brant and cranes.

Q. Do you know where J. G. Smale lives? A. I do.

Q. You know him, and you knew his family, did you not? A. I do.

Q. Are you familiar with the location of a kind of depression or lower point in the ridge quite a little distance south of his house? A. Yes, sir; there is a depression. There (indicating on map) is where the Field house is. Smale lives up here (indicating), somewhere on this ridge, and Mrs. Condit and Mr. Bennett used to. Now, there is right in about here (indicating), somewhere, a depression, where the water is flowing over.

Q. That is a short distance south of Smale's house and a little north of the section line? That is the point you indicate? A. Well, I don't know where the section line is exactly.

Q. Well, you indicate the point on the map. A. It is, I think, in here somewhere (indicating). There is a low depression in here. The railroad track is there (indicating).

Q. In times of high water does the water get through there between the two lakes? A. I have seen the water running across there, and have shot fish on both sides of it. Shot pickerel when they run up in the Spring—on both sides of it.

Q. Have you known of anyone else shooting pickerel in there? A. Yes, sir.

Q. Who and when? A. George Smale shot pickerel there with me.

THE COURT: Q. Do you mean in that depression? A. Yes, sir; right in it. It is filled up now partly.

Q. What do you mean by both sides of it? A. There is a road there now, but at that time it was open so that the water ran right through there.

Q. You mean you shot fish in it? A. In it, yes, sir; in that depression, both sides of the road now. There is a road through there.

Mr. GREGORY: Q. Do you remember the high water of 1887—four years ago last spring? A. I do.

Q. Are there any points on that ridge where the water at that stage would flow across from Wolf Lake to Hyde Lake and connect the two lakes, and if so, what are the points? A. Yes, sir; there is a point between what we call the McDaid Point and where Field's house is; there is a depression there that I have went across with a boat.

Q. How about this other depression that you speak of up near Smale's house? A. I have walked through there with rubber boots when I shot those fish. Couldn't go through there unless I had rubber boots on.

Q. Do you happen to remember how the water was with reference to that in 1887, at this particular time? A. This was in the spring of 1887.

Q. Was the water high then—remarkably so? A. Well, it was rather high that spring, higher than usual, although I have seen water I think sometimes in the eighties, fore part of the eighties, that we could go across between the Field and McDaid's Point there. We could cross with a boat; have crossed there.

THE COURT: Q. In 1880? A. 1881 or 1882. I could not tell. Somewhere in the fore part of the eighties.

Mr. GREGORY: Q. When did you first know this ridge of land? You say you knew the region thirty or thirty-two years ago. Were you familiar with the ridge of land then? A. I have been ever since. Hunted there sometimes all fall and all spring as long as there was anything.

Q. Were there periods of high and low water when you first knew the regions? A. The water would fluctuate, that is, lower and raise. That is, in the spring it would be higher than it would be during the summer.

Q. How does it compare with low water—with present low water? Have you known it in those times as low as of late years? A. Never as low as this summer.

Q. Would you or would you not say that the water had to some extent slightly receded—a tendency that way? A. Within the last three years the water has gone down lower than I ever have seen it in these lakes.

Cross-Examination by Mr. BENNETT.

Q. The high water seasons were in 1882 and 1887—the two high water periods you have spoken of? A. There has been high

water in the spring, and sometimes since it was high, but those are the two that I recollect and remember.

Q. Those years? A. Yes, sir; more than any other, because I took more notice of them.

Q. You pointed out on the map about where you thought this low depression south of Smale's, did you? A. Yes, sir; somewhere right in there (indicating).

Q. Might it not have been where this dark spot is through the white, showing a cut through the ridge? A. No; there is no cut through the ridge there. There is a cut somewhere, I believe, near where there used to be a fence, but that is not the one I have reference to. It runs in this shape (indicating).

Q. You said it was a little north of the fence where I point now? (indicating). A. It is about 150 or 200 yards north of that fence—where the McDaid fence used to be.

Re-direct Examination by MR. GREGORY.

Q. Were you down there with Mr. Rossiter and Mr. Shedd the other day, to this depression? A. I was.

Q. What did you find there in the way of any artificial structure? A. I found that it had been filled up with brush and with gravel and sand.

Q. Raising the natural level of the land a little? A. Yes, sir.

Re-cross Examination by MR. BENNETT.

Q. That was right in the road, was it? A. Well, there is a road made across there; yes, sir.

Q. Hadn't the brush and sand been carried down there? A. Into this depression?

Q. Into the muck by travel so that the surface was about even? A. No. We dug down there, and I think there was a level taken there.

Q. I know; but didn't the travel over the road depress it so it was about level there? A. No, sir.

Cross-Examination by MR. DOUTHART.

Q. When you dug down, what did you find? A. We found brush, gravel and sand. Below that we found black muck.

Q. So it was simply brush, gravel and sand? A. Yes, sir; on top of the black muck.

MR. GREGORY: We will offer the instructions that were given by the Commissioner of the General Land Office to Mr. Wolcott in making the survey of 1874.

Instructions to Wolcott to Make Survey of 1874.

Department of the Interior, General Land Office,
Washington, D. C., Sept. 8th, 1874.

Alexander Wolcott, Esq., Co. Surveyor Cook Co., Chicago, Illinois:

Sir—Application having been made to this office by Franklin Cleveland and others, through their attorney, H. O. McDade, Esq., of Chicago, for the extension of the lines of public surveys over meandered lake situated in sections 19, 20, 28, 30, 31 and 32, Tp. 37 N. R. 15 E. 3rd P. M. Illinois, which according to sworn testimony, has been reclaimed, and the land forming the bed thereof is fit for agricultural purposes, and the sum of eighty dollars has been deposited by the parties interested in the survey for the purpose of covering the expenses of the surveys of so much of said sections as is dry land and admits of the running, measuring and marking of the lines of public surveys, and the applicants for this survey having submitted your statement of the amount for which you will execute a survey, and your name as a proper person for this work, I have consented to appoint you a U. S. Deputy Surveyor for the execution of the work involved in the premises.

Should you accept the appointment and perform the work for the sum deposited as above, you will signify your willingness to this office and proceed to the field to carry out the following instructions, to wit: In the first place you will identify the meander corners of the original survey of so much of the lake as falls within the State of Illinois, and if the lines along the state boundary are surveyable, it will be necessary for you to extend the line between the States of Indiana and Illinois by establishing the proper mile post at a point eighty chains North of the 155 mile corner, which should be identified by you. You will then prolong the lines interrupted by the lake across the same, or so far as the dry land admits of the establishment of permanent corner boundaries, required by the Manual of Surveying Instructions, copy herewith. You will bear in mind that in order to enable parties to acquire title to the lands thus surveyed, it is required that each quarter section should have three corners established and permanently marked and witnessed, as in the absence of them or either of them the land is considered unsurveyed, and consequently no patent for the land thus circumstanced can be issued. In the second place it will be your duty while extending the lines over the lake from the meander corners which are in existence, or which, if destroped by time or accident, should be restored to their places, to prolong from thence the subdivisional and township lines no farther than you find them forming the necessary limits of lands for quarter sections or full sections, and not a chain beyond the point for legal corners, avoiding additional meanders in bounding legal sub-divisions, as the areas thereof must be defined by section

lines, and any fractions of reclaimed land which do not constitute a technical quarter section must be left out.

In the next place your aim and duty will be to complete legal subdivisions of the original survey of the adjacent lands, so that the regular subdivisions may be maintained in each section, and you will number such fractions by consecutive numbers to those already numbered, as per diagram herewith, and calculate the contents of the same.

In order to enable you to identify the former meander corners, as well as the nearest section and quarter section corners of contiguous lands, I transmit to you an extract of so much of the field notes of the former surveyors as will facilitate your operations in the field, and to this end I send you, herewith, field books and field note paper, on the latter of which you will make your returns of survey to this office in proper form as required in the Manual of Surveying Instructions.

You will also furnish a diagram showing the extent of the reclaimed lands in your survey, and in connection with your returns will state, under your official oath, from such sources of information as may be at your command, whether now or at any former point this body of water is or actually has been used as a highway of commerce or has ever been susceptible of such use. You will also state the average depth of the remaining waters, what class of vessels, if any, are in use on such waters, and whether there is any connection between the said waters and the waters of any other stream or lake known to be navigable, and whether there exists on the shores of the lake to be surveyed by you any landing place or places from which freights or passengers are shipped to other ports or places. With your returns of survey you will transmit your account, including all expenses attending the survey, payable out of the funds deposited to the credit of "Individual Deposits."

You are requested to acknowledge the receipt of these instructions at your earliest convenience.

Very respectfully,

S. S. BURDETT,
Commissioner.

MR. STRONG: I read the deposition of William Gardner. I now offer the depositions of Frank Chandler, William C. Farnsworth and Nellie Farnsworth, to be considered in evidence.

Deposition of FRANK CHANDLER, a witness examined on behalf of petitioner Charles B. Shedd, who, being duly sworn, testifies as follows:

Direct Examination by MR. STRONG.

Q. How old are you? A. 39.

Q. Where do you live? A. At Hegewisch at the present time.

Q. Is it near Wolf Lake? A. Yes, sir.

Q. How long have you lived in the neighborhood of Wolf Lake? A. It is four years now.

Q. Do you know the house called the Condit house, where J. G. Smale now lives? A. Yes, sir.

Q. Do you know Mrs. Alice A. Condit? A. Yes, sir; I spoke to her once or twice.

Q. Do you know about when she lived there? A. Yes, sir; that was in 1879 and 1880.

Q. After she moved out of the house who lived in there next, if you know? A. Mr. Smale moved there next; J. G. Smale; he is living there now.

Q. Was the house vacant at any time after Mrs. Condit moved out and before Smale moved in? A. Yes, sir.

Q. How long, if you know? A. Well, I guess, as much as I know, about four or five months.

Q. Do you know the house in which William Bush now lives, formerly occupied by Solomon Field, on Wolf Lake? A. Yes, sir.

* * * * * *

Q. Was Solomon Field living in this Field house in the spring of 1881? A. No, sir; I did not see him in the spring of 1881; I saw him in the fall of 1880.

Q. Did you stop at this house during the spring of 1881 for several days? A. I did for several days.

Q. What month was that? A. I think it was in April, 1881.

Q. Was Solomon Field living there at that time? A. He was not there at the time I was there; I stopped there for four days.

* * * * * *

Q. Who was living in the house at the time you were there? A. In 1881 Mr. William Barnes was living there.

Q. Who lived in the house after Barnes? A. Fogli moved in there after he left.

* * * * * *

Q. After Fogli moved out who was the next tenant in the house, if you know? A. After Fogli moved out I moved in; that was the last; he moved out once before.

* * * * * *

Q. Have you ever been in boats on Wolf and Hyde lakes? A. Yes, sir; I have been in boats on all the lakes.

Q. Have you at any time seen the strip between the lakes submerged with water? A. Yes, sir; I went across in a boat, right on this side of the timber, between Smale's and the Field's.

Q. How high did the water come to the house when you lived there? A. It was within two inches of the floor at the time I lived there in high water.

Q. Could you get away from your house on foot? A. No, sir; I went from the porch in a boat, and went around the house in a boat.

Q. *Whose tenant were you while in there?* A. I was the tenant of the club-house; there is where I got the lease from.

* * * * *

Q. During the year 1881 did you fish and hunt there in the lakes? A. Yes, sir. I fished and hunted there all through 1881; right straight along, from 1874 on, I was fishing through there.

Q. What kind of a house was this club-house? A. It is made out of these common boards.

Q. One thickness of boards? A. Yes, sir.

Q. What were the dimensions of it? A. I could not tell; about 18 or 20 by 22 or 23.

Q. Was there a shingle roof on it? A. Yes, sir.

Q. Was it all one room inside? A. Yes, sir; on the top, and there was a place down below for the boats.

Q. What was it used for? A. To put their boats in, and to stop there to cook and eat in, if they had anything to cook up stairs.

Q. For hunters? A. Yes, sir. For the club; they used to cook themselves.

Q. They had this club-house for the purpose of hunting and fishing? A. Yes, sir.

Q. With reference to the water how was it situated—over the water or on the land? A. The club-house, when it was built, was built on high and dry land.

Q. Was it built on piles? A. No, sir; right on the level of the shore; right on the edge of the water.

Q. Did it ever get so that the water covered it? A. Yes, sir; the boats were floating inside. It got so high as to float them inside

Cross-Examination by Mr. Swett.

Q. When the water was within two inches of the floor of the Field house, to which you testified, was the water on all sides for a long distance? A. Yes, sir; all along on one side; it was between 200 and 300 yards; it used to come clear up to Hegewisch; it was all one lake; that is on the south side of that.

Q. At times of high water how would you get from your house to the shore of the lake, say on the south side? A. I would go with the boats.

Q. How far could you go with the boats? A. After the railroad track was built in the spring I had to go clean around about 300 yards in high water up to high and dry land. That is, south.

Q. You do not mean to say it is 300 yards from the house to the shore in a straight line? A. I went 300 yards south; the water covered that space 300 yards south. That is, between 200 and 300 yards; I never measured it.

Q. Did you ever cross from Wolf Lake to Hyde Lake in a boat? A. Yes, sir.

Q. Which side of the house? A. North; we always used to go south then; I used to go off by going north; when the water was high I did not have to go south.

Q. How far is it that the water extended north of Field's house in high water, on to where the timber is? A. Some of the timber was in the water.

Q. How near would the water come to the west of that ridge—how near would it come to the timber from the west side. A. Some of the timber was all in water on the west side.

Q. Was it so as to the timber on the east side of the ridge? A. Some parts of it we had to wade, to go through; it left a little ridge; you may say about eight feet that there would not be any water; the rest was all water; it was about eight or ten feet square, and then the rest would be water again on to the lake.

Q. I understand you then—that the water came up on the two sides, leaving a space in some places only about eight or ten feet wide? A. Yes, sir.

Q. That space was covered with timber? A. No, sir; that was a kind of space where the wagon rut was—it was up to McDaid's Point.

Q. The water would come up around the trees? A. Yes, sir; a little further north.

Q. Did you ever hear the place where Mr. Field lived called Elm Island? A. Yes, sir.

Q. Was it commonly called by that name? A. No, sir; it was not commonly called that way, but I heard it mentioned two or three times.

Q. Where do you live now? A. I live in Hegewisch.

Q. Do you know about the present condition of the water in Wolf and Hyde lakes? A. Yes, sir.

Q. Is the water high or low? A. It is very low just now.

Q. When did you first know of the condition of the water down there—when did you first get acquainted with their condition? A. That was way in 1872 and 1873.

Q. How did the water compare in depth in those lakes there then with the present—was it deeper or shallower? A. It was deeper in some parts. There was only one time that it was not as shallow as at the present time; it was deeper—always.

Q. Have you frequently seen water come up across between the lakes?

Objected to as leading.

A. In the spring time, I used to come through there and would see water coming across there.

Q. You are a hunter and trapper? A. Yes, sir; I was a hunter right straight through; I did not trap much.

Q. Is the water deep or shallow now in Hyde Lake? A. It is pretty shallow now.

Q. Could you get a boat through there easily now? A. In some parts of it you can; after you get where they have dredged you cannot go with a boat.

Q. Is the water of Hyde Lake generally deep or shallow? A. It is shallow.

Q. It is shallow enough to walk around with rubber boots? A. On the west side you can not very well walk on account of the mud; where there is sand you can walk with rubber boots on.

Q. How deep would the water be? A. It would average about one and a half feet where you can walk—some parts of it, and some parts are much more shallow.

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Cross-Examination by MR. BENNETT.

Q. The first time you went down to the Field house to live there was four years ago? A. Yes, sir.

Q. What time of the year was it? A. That was in July, 1886.

Q. Where did you live when you went down there at that time? A. I lived right here in Chicago.

Q. How long before that had you lived in Chicago from that time? A. I lived right straight along in Chicago.

Q. Always? A. Yes, sir.

Q. You never lived nearer the land down there than Chicago before? A. No, sir; not before; I always lived in Chicago.

Q. Then all the acquaintance you had with that land was acquired when down there hunting and fishing, while you lived in Chicago, before you went down there to live? A. No, sir; because I wanted to get that place once before; that was in 1880; that was the time I got acquainted with the place the first time, in 1879 and 1880. I wanted to get it when empty.

Q. Before 1879 and 1880 you had not been down there very much? A. Yes, sir; before 1879 and 1880 I had been all around those lakes—around Sommer's and Reese's.

Q. In what years? A. From 1872 up.

Q. You had not been down there before 1872? A. I used to shoot and fish over to Calumet before that time; that was way before the fire.

Q. How long before the fire? A. Two or three years before the fire.

Q. How long at a time would you be down there during those years? A. A day or two; sometimes two weeks, and sometimes—in the spring, I would sometimes stay two weeks at a time; I went every fall and spring, and sometimes in the summer—in July.

Q. Do you recollect any one year that you went down in July before you went to live there? A. Yes, sir.

Q. What year was it? A That was in 1882 and 1884; I was up in 1872 and 1873. That is the time I started in; I used to go there regular.

Q. Where did you go to the first time you went there to hunt? A. To John Crider's; that is in Indiana. William Barnes and I used to stop with Jim Sommers.

Q. Barnes lived near the Indiana line—near the mouth of Wolf Lake? A. Yes, sir.

Q. Did you usually hunt and fish over in Indiana? A. I used to go right in through the lakes; I used to fish in the outlet there.

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Q. What years was it that you say you crossed from one lake to the other at the same point, at Smale's place, at Condit's place and at the Field place? A. I guess it was in 1879, and then up in 1880; right along through from that time on.

Q. The first time you speak of going there you were living in the city? A. Yes, sir.

Q. At what particular point did you go across? A. At McDaid's Point. We went around at that timber, and went across on the south side of the timber, and the north side of the house. There was another place where we used to have another outlet, and we had to pull the boat across the bridges; that is right on this side of Condit's place; there used to be an outlet there; it was between McDaid's and Smale's place.

Q. Was it south of McDaid's? A. It was north of the McDaid place, and south of Condit's place; we used to have to take and pull our boat across that little bridge; we used to go south of McDaid's Point to go through there.

Q. Who talked with you about your evidence—about riding around with those boats? A. No one.

Q. Had you not talked with Hardin on the subject? A. No, sir; I never saw him before to-day.

Q. Hadn't you talked with Judge Prescott? A. No, sir; I never saw him.

Q. Did you ever see Judge Prescott before this morning? A. No, sir; I do not think I ever saw him before.

MR. SWETT: Q. Have you ever seen me before? A. I did not speak to any of these gentlemen about it.

MR. STRONG: Q. I asked you questions about what you knew of the situation down there? A. Yes, sir.

Q. You came to my office, and I asked you what you knew down there? A. Yes, sir; you asked me certain questions, and I answered them.

Re-cross Examination by MR. BENNETT.

Q. You say the water was higher when you went down there under your lease? A. Yes, sir.

Q. Was the mouth of Wolf River closed at that time? A. I do not know whether it was closed at that time or not.

Q. From your knowledge down there isn't it a fact the high water generally comes from the Wolf River overflow? A. That is generally so.

Q. How far was the boat house from the Field house? A. Just about 100 feet; I did not measure it.

Q. That, you say, was built in 1883, you think? A. Yes, sir.

Q. It was built on high and dry ground? A. Yes, sir.

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Q. At that time of the year would the water be high—at the time testified to by you? A. Just about the latter part of January—the January thaw—snow and ice would make it higher; as soon as the snow thawed and the rain fell it would be higher.

Q At such time would there be ice and snow to muddy the water from the flow off of the ground? A. Not everywhere.

Q. At the time of high water the water would bank up and could not pass? A. I could not say it was backed up in those days; I know Lake George's outlet was.

Q. Would it usually occur when the ice was still on Hyde take that the water was high? A. Yes, sir; it was ice all over the lakes, and sometimes, when it broke open, the water would be right over the ice.

Q. It was only temporary, however, and would pass off in a short time? A. There was one part I could go through most any time.

Q. Through where? A. Across the ridge, between the McDaid place and the Field house. It was a kind of a marsh to go through.

Q. Was there any obstruction from the road that Field built there? A. Not until Fogli had put a kind of a bridge across; he filled it up with hay.

Q. It was a sort of a ditch? A. That was south of that where the ditch was, but this was north of the house.

Q. Was there a ditch there where Fogli placed hay across? A. There was some kind of a run from the center of the place; there was a kind of a run out there; where the water had washed out.

Q. In any of the years you were down there was hay cut on the place? A. Yes, sir.

Q. For how many years?

Objected to as not cross-examination.

A. Only one year that I know of.

Q. Was there hay cut between the Field house and the McDaid place that year you were living there? A. Yes, sir; there was hay cut in there.

Q. How much? A. I could not say anything about it, because I did not cut it.

Q. You do not know how much was cut? A. No, sir; I do not.

Q. Locate more definitely the place you cut across most any time from Wolf to Hyde Lake while you were down there? A. It is not quite in the center; I could not say exactly; it is more towards McDaid's than it is to the house.

Q. Between the Field house and the McDaid place? A. A little nearer the McDaid place than to the house.

Q. You say in dry times you could cross there with a boat? A. Yes, sir; that was the time the water was high all through; now it is not so.

Q. The driest time down there you could cross in a boat? A. Before I lived there you could.

Q. How was it at the time you lived there? A. I went in there with a boat, but did not go clean across.

Q. At any time when the water was not high could you go across? A. Not while I lived there; I went only half way across; the railroad blocked up in there.

Q. In that place what is the distance from the waters of Hyde Lake to the waters of Wolf Lake—at the place where you could cross in a boat at that time? A. It is about 200 or 300 feet, I guess.

Q. From Hyde Lake to Wolf Lake? A. Yes, sir; from the place I have reference to

Q. That place is south of the McDaid place and north of the Field place? A, Yes, sir.

Q. Do you swear there is a place between the McDaid place and the Field place as short a distance as 300 or 400 feet from the permanent waters of Hyde Lake to the permanent waters of Wolf Lake at that time? A. At the present time; I would say it is 300 feet; it is between 300 and 500 feet now; I would not swear to that either; I never measured it. I could not swear to the distance. At the time I went through there and at the time I was there I could swear it was not over 200 or 300 feet—200 feet.

Q. I asked you to state whether you could be positive that the distance at this time from the waters of Hyde Lake to those of Wolf Lake, crossing with a boat at any time you lived there, is no more than 300 or 400 feet? A. I cannot tell; I would not swear to whether it is 300, 400 or 500 feet at the present time.

Q. About how far is it? A. I could not swear to it, how far; the way I judge about it it would be about between 300 and 400 feet. That is right at McDaid's Point, this side, where the Point comes in, south of McDaid's.

Q. Will you swear there is any point south of the McDaid Point where the distance from lake to lake is less than 600 feet at this time?

Objected to because the witness stated he did not know, and would not swear to it at the present day.

Q. You could not state the distance? A. Not the present day.

Deposition of WILLIAM C. FARNSWORTH, a witness on behalf of petitioner Charles B. Shedd, who, being duly sworn, testifies as follows:

MR. STRONG: Q. Where do you live? A. Hegewisch.

Q. How long have you lived there? A. I have lived there continually since 1882.

Q. Where did you live before that? A. South Chicago.

Q. When did you first move to the Wolf Lake region? A. That is probably eighteen or nineteen years ago; it is over that.

Q. You have been acquainted with the country around Wolf Lake for eighteen or nineteen years? A. Yes, sir; twenty-seven years.

Q. Did you know Mrs. Alice Condit? A. Yes, sir.

Q. Where did she live? A. She lived in the place that is called Bennett; Ellis Bennett lived there previously. It is what is called the Smale place.

* * * * *

Q. Do you know the house now occupied by Mr. Bush on Wolf Lake? A. Yes, sir.

Q. This was the house formerly occupied by Solomon Field? A. Yes, sir.

Q. When did Solomon Field live there, if you know? A. About 1879; he lived there in 1879, I think.

Q. Did he live there in the year 1881? A. No, sir.

Q. When did he move from the house, if you know? A. I think he left there in 1881; he left there in the spring.

Q. Who lived there after Solomon Field lived in the Field house? A. Barnes lived there first.

Q. After Barnes left there who went into the house next? A. There was nobody, in fact; after Barnes left there nobody lived there.

Q. Who was the first one that lived there after he went away? A. A man by the name of Tom Cash; he had charge of it.

Q. Did he live in the house? A. He lived sometimes in Cleveland's and sometimes there. The water drove him from there. He did live there, yes.

Q. Who was the first one that lived in the house after Barnes left it? A. Ben Fogli.

Q. After Barnes left it and before Fogli came in, was the house vacant at all? A. Yes, sir.

Q. For how long a time? A. For nearly a year.

Q. Who lived in the house after Fogli? A. Nobody, until Frank Chandler went in, who was the first one.

Q. After Fogli went out and before Chandler came in, was the house vacant at all? A. Yes, sir; I went down to the house to lease it; I went to Mr. Bennett.

Q. How long was it vacant between Fogli and Chandler? A. It was vacant in 1882, 1883 and 1885.

Q. From four to six months? A. Yes, sir; it averaged from four to six months, and from that time more.

Q. After Fogli moved out, then who lived there? A. Nobody.

Q. Who was the next person that lived there? A. Frank Chandler; he moved there the next spring.

* * * * *

Q. Are you familiar with the strip of land between Wolf and Hyde lakes? A. I am, indeed.

Q. Have you ever, at any time, seen this place covered with water? A. Yes, sir.

Q. Often? A. Two or three times.

Q. Did you cross there with a boat? A. Yes, sir; I could with a wagon there, too.

* * * * *

Q. Did you ever see Mr. John I. Bennett about getting a lease? A. I did.

* * * * *

Q. You saw Mr. Bennett? A. Yes, sir.

Q. What did he say? A. He said he would let me know in two or three days.

Q. Did he let you know? A. Yes, sir; he did so; he wrote me.

Q. Have you got that letter? A. I have not.

Q. Did you destroy it? A I believe he said the railroad was going through there, and he did not know but what he would sell the place; he did not want to rent the place.

Q. There was no tenant in there? A. No, sir.

Q. What time was it? A. It was in 1886. It was just before Chandler was in there; I think it was in June. In 1883 my wife and my wife's sister went down and cleaned it out, when Gardner got a lease for it.

Q. Were you down there then? A. Yes, sir.

Q. Was there anything in the house? A. No, sir; there was nothing.

Q. During the first times when you knew this region down there, was there more or less land between the lakes than there is now? A. No, sir.

Q. Was the strip narrower or wider than it is now? A. I do not see much of a difference, since the channels; I have seen it all in one.

Q. Did you see them look like one lake? A. Yes, sir.

Cross-Examination by Mr. Swett.

Q. You went up there with Gardner to wash out the house? A. I did not; my wife and my wife's sister.

Q. Did you go up there at the time at all? A. I was in the city; I went down to the city that morning.

Q. Did you see the house at that time? A. Yes, sir; I was down there twice a week.

Q. Did you go into the house at the time your wife washed it out? A. Yes sir; I was down there before they went away.

Q. Did you see where they got the water from? A. Out of a trap hole in the floor.

Q. How far from the house was the water? A. It was under the floor.

Q. How near did the water come up to the house? A. The

lake was probably sixty yards away. I did not see that it was surrounded at that time.

Q. Have you ever seen it surrounded? How near did you see the water come to the house? A. So that you could step out of the door into it.

Q. Have you ever seen it so that you could get up to the house in a boat? A. Yes, sir.

Q. Did you ever go to the house in a boat? A. I tried to go there with a team and could not.

Q. Did you ever go up to the house with a boat? A. I could have done it if I had tried, but never did it. I could have done it if necessary.

Q. Has anyone ever taken you around that locality from one lake to the other in a boat? A. Yes, sir; Smale has taken me from the house across to the high ridge.

Q. You mean from the Field house north to the Smale ridge? A. He has taken me across to where I wanted to go to my house south of the Smale place. I could not get over there. He took me across in a boat.

Cross-Examination by MR. BENNETT.

Q. Where did you live before you went to Hegewisch? A. Chicago.

Q. How long did you live there before? A. Seven or eight years. I lived in Cottage Grove before that; we built the Bennett place and lived there four or five years.

Q. How long did you live in Cottage Grove? A. I lived in Cottage Grove about ten years. I lived there ever since the Chicago fire—around that region.

Q. Where did you live before you lived at Cottage Grove? A. Nowhere; only right there.

Q. At what particular place did you live before you lived at Cottage Grove? A. I came from Dubuque, Iowa; I was about four or five years of age at that time.

Q. What is your business? A. My business is keeping a boarding-house. I had a restaurant there first, and I now keep a boarding-house.

Q. Has that always been your business? A. I was keeping a hunting and fishing place; I was in the lake all the time down at the Field place, three or four times a week; I kept boats and fishing tackle in South Chicago for many years.

Q. When was it you say that the Condit house was vacant? A. After Mrs. Condit went out of it, it was vacant. I do not specify the year, because I cannot think of it.

Q. Can you name the year? A. I cannot tell; it was during the time I lived in South Chicago.

Q. Were you down there during that time? A. Yes, sir.

Q. Who was with you? A. Sometimes I was alone, and sometimes I was rowing somebody.

Q. You saw the house vacant where Mrs. Condit lived? A. I was by myself that I went by there.

Q. Was anybody with you? A. Not that I can recollect. I am pretty well acquainted with Mr. Smale; he was a schoolmate of mine in Chicago.

* * * * *

Q. How many times were you there in 1881? A. Probably twenty or thirty times; probably fifty times. I did not keep track of it.

Q. How many times in a year? A. Probably seventy-five or a hundred times; may be more.

Q. Who was in the Field house in 1881? A. Barnes lived there.

* * * * *

Q. At what place did you get stalled with your wagon? A. Pretty near your door down there; about ten or fifteen or twenty feet from the house.

Q. Which way? A. Towards the lake.

Q. Do you mean the Field house? A. Yes, sir; this sandy ridge you speak of was rather watery when I was there.

Q. The lake has a sandy bottom? A. Not all over.

Q. Is it directly east of the house? A. Yes, sir.

Q. You got stalled there, too? A. Yes, sir.

Q. Who was with you? A. My sister-in-law and a niece.

Q. Did you have one or two horses? A. One.

* * * * *

Q. You say there have been two or three times you have seen the land down there covered with water—when were those times? A. I will take it in 1882, for instance; that is once. I saw it in 1886 again.

Q. Both of those times there was unusually high water? A. Back water.

Q. Were the mouths of both lakes closed at that time? A. Yes, sir; they generally opened it.

Q. Don't you recollect at those times it was closed? A. Well, surely, they, as a general thing, if they wanted it, they opened the mouth.

Q. When the mouth of Wolf River is closed the water banks up there? A. Yes, sir.

Q. What times of the year were those two or three times? A. In 1882 it was in the spring; in 1886 it was in the fall.

Q. In the spring was there ice and snow on the ground? A. No, sir.

Q. How was it in 1886? A. That was a little kind of snow.

Q. Was there ice on the lakes, or had there been? A. No, sir; a little scum on it; that is about all.

Q. This time in 1886—was this just before Chandler went in there, that you speak of? A. Yes, sir; it was even while Chandler was there.

Q. You say that one of the times was in 1886—what time was it? A. It was in the fall; Chandler was there then; he could not hardly get out of the house.

Q. The third time you speak of is when Chandler was in the house and it was cleaned out? A. No, sir.

Q. When was the third time? A. I never mentioned a third time; I saw it a dozen times; I am sure of that, but I have no dates; what I am talking about I am sure of. When that house was cleaned out we could walk there.

Q. You think there is little difference down there in the water on the land from the time you first knew it? A. I do not see much difference in it.

Q. The land is about the same and the water is about the same as when you first knew it? A. Yes, sir; sometimes you could get there and sometimes you could not; I think the house is on the highest part of the property.

Q. When you first knew it the water was very low? A. O, I do not know; the water, if anything, was a little higher.

Q The water of Hyde Lake was quite low way back? A. I never saw it as low as it is now; it never was so low since that railroad is built.

Q. Have you seen cattle wade through Hyde Lake years ago? A. I have seen cattle wade way across.

Q. Before Chandler moved in there I understood you to say the house was not surrounded entirely by water? A. No, sir.

Q. Mr. Gardner testified it was surrounded by water at that time—at the time Chandler moved in there? Was he mistaken? A. I do not know; I do not know as he is mistaken about that.

Q. Don't you know that people were in the habit of driving more or less across that ridge from north to south and from south to north for years? A. Certainly they used to drive there, but they had to do it at times when the water was mighty low.

Q. Do you know that Mr. Field used to drive through? A. It was very low water when they drove along there?

Q. Have you seen Field driving through? A. No, sir.

Q. Have you seen others? A. I have done it myself.

Q. Many times? A. No, sir; the water was very low at that time, though. Very few times in the year without there is water on the ground. You wanted rubber boots to wade through just the same. I shot snipe over there a good many years.

Q. How recently have you been over that ground? A. Last week.

Q. Did you ever know the ground from the Field place to the Smale place burned over at any time? A. Yes, sir.

Q. How many times? A. Probably two or three times.

Q. Do you know whether it was mowed this last year? A. Yes, sir; along the railroad track; I never noticed it any other place. I have not been down to Smale's place for quite a while.

Q. It was pretty much all mowed? A. Yes, sir; along the track.

Q. From the waters of Hyde Lake to the waters of Wolf Lake, what distance would you say it would average? A. I do not know; 150 yards, I guess.

Q. Have you not seen other times when there was as much dry land as there is now, substantially, between those two bodies of water? A. I never saw the time to my knowledge that I could walk there dry-shod over that ground.

Q. Have you not tried it this year? A. No, sir.

Q. Have you not seen them mowing? A. No, sir; I saw them cutting with scythe, and had on rubber boots.

Q. Did you see them cutting with scythe? A. Yes, sir; along the railroad.

Q Have you not seen them cut with machines? A. I never noticed it.

Q. You testified in reference to Smale taking you in a boat? A. Yes, sir.

Q. Where did he take you from? A. He took me from the Field house over across to where the channel goes through between the two lakes; he took me on high and dry ground; I know he took me along.

Q. He took you from the Field house? A. Yes, sir.

Q. Near where the club-house is, through the channel south of the club-house, and along the bank of Wolf Lake down to high ground? A. Yes, sir.

Q. He took you nowhere except on Wolf Lake. A. Yes, sir.

By MR. STRONG: Q. Was it over to parts that are dry now? A. No, sir; I was in there with rubber boots, and this channel is so deep at one place there, where you go from one lake to the other through, he took me across in a boat.

Deposition of NELLIE FARNSWORTH, a witness examined on behalf of petitioner Charles B. Shedd, who, being duly sworn, testifies as follows:

Direct Examination by MR. STRONG.

Q. Where do you live? A. Hegewisch.

Q. How long have you lived there? A. Since the 2nd of April, 1884.

Q. Where did you live before? A. Right by the bay—on the bay.

Q. Do you know the house called the Field house? A. Yes, sir.

Q. Where was it in reference to that house? A. Our house was south from there; we lived south of there.

Q. How far from the Field house? A. I could not tell; it

might be probably about a mile, a little more or a little less; it was near that.

Q. When did you move to that place? A. In 1882—in July.

* * * * *

Q. In the summer of 1882 did you do any work about the house? A. No, sir; in 1883 Gardner said he had leased the place, and was at our house and stayed a few days, and my sister was visiting with me, and he said he was going to live there, and we went with him to scrub and clean it out.

* * * * *

Q. Was any water about the house at the time? A. There was a trap door in the floor which we opened and dipped up the water to scrub with.

Q. You took the water from right under the floor? A. Yes, sir.

Q. How far from the floor was the water? A. Not very far.

Q. How did you get to the house—did you walk there? A. Yes, sir; there was a little bridge there that we crossed; it was a kind of wet; it would fill up to my shoes.

Q. You had to wade to get to the house? A. Yes, sir.

Q. This was in the year 1883? A. Yes, sir. I am positive of that.

Cross-Examination by Mr. Willoughby.

* * * * *

Q. Where did you live at that time? A. On the banks of Wolf Lake.

Q. Do you know where Mr. Philips lived? A. He lived close by.

Q. How far is it from the Field house? A. About a mile.

Q. How did you go from your house down to the Field house? A. Sometimes we went by land, and sometimes by water in a boat.

Q. I mean the time when the house was vacant, when you came down there? A. Sometimes in boats and sometimes we walked down.

Q. How was it at the time you came to clean it out for Gardner? A. It was very wet.

Q. How did you come down? A. Waded down part of the time; I came down by land from my house; I took off my shoes.

Q. Where was the bridge you speak of? A. Over the channel.

Q. Where does that lead from? A. You had to cross the channel to get to the Field house.

Q. You lived to the south or north of the Field house? A. South.

Q. You crossed over this bridge as you came down. A. Yes, sir.

Q. You say it was quite wet? A. Yes, sir.

Q. It was not so wet but what you got down there? A. Yes, sir.

Q. And not so wet that you undertook to go down? A. Yes, sir.

* * * * *

CHARLES B. SHEDD, recalled on his own behalf, testified as follows:

Direct Examination by MR. GREGORY.

Q. You were down with Mr. Rossiter a few weeks ago, and Mr. Field and Mr. Spahn, into this natural depression south of Smale's house a little ways, I believe? A. I was.

Q. What did you find there at that time?

Objected to by MR. GOUDY as immaterial.

THE COURT: You have proved it three or four times, that is, in regard to finding the artificial elevation made by brush, the corduroy road, and so on. I do not see the necessity of going over it again.

* * * * *

Q. What is the highest water mark for high water that you have personally noted up there on Wolf Lake, Mr. Shedd? When? A. In the spring or the late winter of 1887 I was at Wolf Lake when the water was quite high, and I made a mark on the cap of one of the inclines, an oak cap on top of the pile. I took my knife and cut a notch in the cap of the height of the water at that time. I was there on the 14th of last November with Mr. Rossiter and took a measurement from the water to that mark. It was four feet and three-fourths of an inch, and Mr. Rossiter afterwards informed me that the water that day was about three inches above datum, so that would make the mark about four feet and four inches above datum, and the water rose considerably after that, as I heard from people that came in.

Q. Did you do anything about letting the water out, lower it, or have anything done there? A. I did not personally myself, but the men in our employ did open up the outlet. They used dynamite to blast it.

Q. What outlet? A. The outlet into Lake Michigan.

Q. What was the result? A. The result was as soon as the water got started and undermined the frozen earth that it carried the sand out in large quantities and opened a large channel into Lake Michigan. The water went out into Lake Michigan with a roar and made a stream in the lake that you could see a long distance.

Q. The water was higher then than Lake Michigan? A. Yes, sir; a good deal higher.

THE COURT: Q. When was it you made this mark? A. I think it was in February, 1887.

MR. GREGORY: I merely offered that proof to show that the high water in the lake sometimes might exist, notwithstanding the fact that there is connection with Lake Michigan.

* * * * *

Wednesday, December 9th, 1891. 10 o'clock A. M. Court met pursuant to adjournment.

SYLVESTER N. HOWARD, called as a witness on behalf of the defendant Jordan, was duly sworn, and testified as follows.

Direct Examination by Mr. BENNETT.

Q. What is your name? A. Sylvester N. Howard.
Q. What is your business? A. I am a surveyor.
Q. How long have you been a surveyor? A. About sixteen years.
Q. How long in Chicago, Cook County? A. All during that time.
Q. Are you a member of any firm of surveyors? If so, what? A. I am a member of the Greeley-Carlson Company.
Q. I will ask you if your firm at any time published an atlas which embraced sections 19, 20, 29 and 30, 37, 15, in this county? A. Yes, sir.
Q. Was that atlas published from actual surveys and measurements made on the ground? A. Yes, sir.
Q. Who made those measurements? A. The measurements were made by myself.
Q. Entirely, or almost entirely? A. In this particular locality they were made entirely by myself.
Q. When were they made? A. During the years 1882 and 1883.
Q. State in a general way what measurements you did take upon which to base your atlas—what territory you covered. A. We measured the section and quarter section lines, and located Hyde and Wolf lakes.
Q. You made measurements between Hyde and Wolf lakes? A. Yes, sir.
Q. Did you run the government meander line at any time, or had you before? A. Not before that. I have done that since partly—that is, through a part of those sections.
Q. You have measured the government meander line? A. Yes, sir.
Q. When was that? A. That was in 1884, I think.
Q. When was the atlas published? A. Published in March, 1883. That was the date of the closing.
Q. Has the atlas since publication been in general use among real estate and professional men and business men generally? A. It has been used quite extensively.
Q. Was it in use by the Village of Hyde Park before annexa-

tion, if you know? A. I think it was. I am not positive, though, as to this volume.

Q. Is it in use by the city now? A. I could not state positively.

Q. In making your measurement down there on those sections 19, 20, 29 and 30, for the purpose of making this map, did you discover any error in the government survey of 1835?

Objected to by MR. GREGORY.

(Question withdrawn.)

Q. In locating the outlet of Hyde Lake on the southeast of 30, 37, 15, did you discover the facts different as represented on the government map of that lake?

Objected to by MR. GREGORY.

Q. Did you discover any error in the measurement by locating the outlet at any time?

Objected to by MR. GREGORY.

THE COURT: Gentlemen, I think it would be better to admit this evidence subject to objection without any intimation as to what effect I think it may have. I have tried to follow the rule that except in a plain case, if evidence was incompetent or in admissible I would admit the evidence; in other words, where there was any possible doubt in the mind of the court as to its being admissible for any purpose, so that it might all go before the upper court. I think that is a safe rule. It may be that this evidence might be held admissible if for no other purpose than as it were an impeachment of the evidence of Rossiter, and it may be admissible for other purposes. Subject to objection I will admit it. It is admitted that the question of this alleged mistake is really no surprise on the other side.

MR. DENT: If we should find it desirable to rebut—

THE COURT: I will pass on that when it comes up. It is impossible in a case where there are so many petitions and cross-petitions as there are here, to follow any rigid rules with the reception of evidence.

(Last question read.)

A. I did not discover any error at that time, for the reason that I did not locate the meander lines on the grounds. I located the outlet of Hyde Lake, but not the meander line.

* * * * *

MR. BENNETT: Q. Look at the plat of the government survey of Wolf and Hyde lakes of 1834 and 1835, and say if that is the one from which you are testifying now, or if your testimony is correct with reference to that map? A. It seems to be marked about in the same place. I say I do not see any dimensions fixing the location of the outlet precisely.

Q. Well, if you know, Mr. Howard, state how far north of the real outlet of Hyde Lake the outlet shown on that map is? A. Well, as I said before, I do not see anything here to show exactly where it is.

Q. How far do you estimate it to be, having measured the

ground yourself? A. Well, it is all guess work taken from this map, because there are no dimensions on it to show where it is, that I see. There are no dimensions there. It is simply estimating by eye the comparative distance between two lines.

Q. Can you say how far south of the outlet as shown on the government map you have shown the outlet on your map? A. I can say as to about how far the outlet is from the south line of the northeast quarter.

Q. Well, that will give it. A. That is about at a point 120 feet east of the west line of the northeast quarter; the outlet, what you might call the creek, is 250 feet north of the south line.

Q. That is the half section line? A. Yes, sir.

Q. Of 30? A. That was as far east as we located this creek or outlet, as you call it. Beyond that it is simply traced on there at random. Could not get entirely out to the water.

MR. GREGORY: Q. You are now referring to the map on page 58 of your atlas, are you? A. Yes, sir.

Q. And the tracing east of the point you have indicated is imaginary? A. Yes, sir; this point which I have indicated, however, comes very nearly to the government meander line.

MR. BENNETT: Q. Look at the government notes, the survey of the meander line of 1834 and 1835, and at the courses immediately to the south and immediately to the north of the outlet as you know it to be, and state if you can give the distance from the field notes? (handing same to witness).

THE COURT: The government field notes?

MR. BENNETT: The government field notes.

MR. DENT: What exhibit is that?

MR. BENNETT: It is the field notes of 1834 and 1835.

Q. The course previous to the mention of the outlet is 15 chains? A. Yes, sir.

Q. And the next course? A. The next course is north 14 east 26.15 chains.

Q. Now, from that and your knowledge of the ground from your survey, can you give approximately the distance from the real outlet to the one shown on the government map of 1834 and 1835? A. The outlet as shown in the government field notes I make about 600 feet north of where it is shown on our atlas.

Q. Six hundred feet? A. Yes, sir.

Q. Is the outlet located on the government map of 1834 and 1835 apparently where the field notes would place it? A. Well, judging by eye, I should say it was located on the map a little further north than it is in the field notes.

Q. Mr. Howard, in running out the southerly meanders of Hyde Lake did you discover any error there? Did you bring the course together? A. That work was done by Mr. Greeley.

Q. He figured it out and you followed his directions? A. Well, we did not locate the meander line on the ground.

Q. Mr. Howard, I would ask you, as a surveyor, whether after

leaving a station, and several courses are run without mention of the character of the ground over which the courses have run, and then, at the end of all the courses, there would be remarks with reference to the character of the ground, whether those remarks would relate to all the courses since the last station, the fractional section corner, or section corner—if that would be the last? A. I should think that would relate to the entire line.

Q. Look, if you please, at the field notes of 1834 and 1835 again, at the closing of the line at the Indiana state line there, and note the language: "Land all marsh: water from 6 inches to 3½ feet"; and state whether, in your judgment as a surveyor, that would relate to the whole line back to the fractional section corner of 19 and 20, which was the last station? (handing field notes to witness). A. I should think it would.

THE COURT: Relate to what? To the whole section line?

MR. BENNETT: Back to the fractional section corner.

Q. Now, the last station, as I called it, is to the corner of sections 19 and 20, township 37 north, range 15 east; then it runs 9 courses without any remarks, and at the close the remark is, "Land all marsh; water from 6 inches to 3½ feet deep." Do I understand that your opinion is that language would relate back to these eight or nine courses, the last starting point, the corner of sections 19 and 20? A. That was back to the west line of section 20.

Q. Do you know this ridge run over by this meander line—this south line of 20? A. Yes, sir.

Q. Being the southerly meander line of the fractional southwest quarter of fractional section 20? A. Yes, sir.

Q. It would relate to that as well as to the other portion of the line? A. That would be my opinion.

Q. You say these surveys were made in 1882 or 1883? A. In 1882 and 1883.

Q. Were those wet years? A. That I could not tell you.

Q. Well, did you survey the land lying between Wolf and Hyde lakes at that time with the rest for the purposes of your map? A. I located the shores of Hyde Lake and Wolf Lake.

Q. Is your map correct with reference to that dividing line? A. Yes, sir.

Q. Is it correct generally with reference to this portion of it, namely, 19, 20, 29 and 30? A. Yes, sir.

Q. I understand you, Mr. Greeley figured with you in reference to the south end of the meander line at the south end of Hyde Lake, and knows the fact? A. Mr. Greeley figured that alone; I had nothing to do with that.

Q. Weren't you with him in the office? A. No, sir.

Cross-Examination by MR. GREGORY.

Q. Are you familiar with the government field notes of other surveys, Mr. Howard? A. Yes, sir; I consult them frequently.

Q. Do these notes generally fully describe the character of the

ground and so forth? A. I don't know as you could say they fully describe it. I suppose it is intended as a general description.

Q. They are rather fragmentary notes entered in the field book of the man on the ground at the time, are they not, and not intended to be full description?

MR. GOUDY: I don't suppose he knows anything about that.

MR. GREGORY: Well, I want to know whether he does.

A. That is my opinion.

Q. Take the note just above the courses and distances to which you testify, which reads: "To the corner to sections 19, 20, township 37, north range 15, east, land first 15 chains first rate soil, well timbered, with white yellow and burr oak, hickory, linden, and so forth; undergrowth, hazel, briers." What land does that refer to? A. That refers, to the land, I suppose, along the meander line throughout section 19.

Q. Well, it only refers to fifteen chains there in the first place, doesn't it? A. Well, they say, "Land first 15 chains first rate soil, well timbered with white, yellow and burr oak, hickory, linden, and so forth; undergrowth, hazel and briers. Thence, from said corner to fractional sections 19 and 20, along the northern margin of lake"—well, that is another description of land.

Q. May not that note refer to the land at that section corner? A. No, because he says specifically it is the first fifteen chains.

Q. Well, that means the first fifteen chains of what? Courses and distances? A. That would be the course from the last starting point—from the last section line.

Q. Do you know, as a matter of fact, whether that land answered that description the first fifteen chains—the first distance? A. Well, I think reasonably well. I know there is timber in that neighborhood.

Q. Where? On 19? A. On the south part of 19.

Q. As to the location of the outlet, you think by the government notes it is located about 600 feet north of where it would be located by the survey that you made in 1882? A. In 1882 and 1883. I think about that.

Q. That would not affect the quantity of land in the government survey of 1834, would it—included in it, merely locating this outlet a little farther north? A. No, it would make no difference in the location of the meander lines.

Cross-Examination by MR. DENT.

Q. How did you ascertain, Mr. Howard, that it was the outlet that was intended to be represented by the government plat and field notes? A. It is the only outlet that is visible on the ground.

Q. Do you mean that water was running there? A. Yes, sir; or at any rate there was water there. I don't remember. I think there was not very much current in it, but there was water standing in the outlet or creek, as they call it there.

Q. Did the water in that creek or outlet extend all the way across to the lake? It is so represented on your plat, is it not? A.

Yes, sir; I think so, except as I said before, that beyond the meander line, this outlet as shown was not actually located. It was estimated by eye. There was no actual survey of it.

Q. I don't know that I quite understand whether you suggest that the outlet was not measured east or west? A. What I say is, the outlet as shown on our map was not actually—there was no actual survey made of it, east of the meander line. Our map shows the west margin of Hyde Lake, as being a considerable distance east of the goverment meander line, and between that line and the meander line we made no actual survey of the outlet.

Q. You represented the west line of Hyde Lake as it stood at some particular time, didn't you? A. At that time, yes, sir.

Q. At the time you surveyed? A. Yes. sir.

Q. That is variable, is it not—the west line of the water of Hyde Lake? A. Yes, I suppose it would vary of course with the elevation of the water.

Q. Did you observe the elevation of the land along the meander line north and south of where you represented that outlet on your plat, to see whether there was any other depression? A. I have been along there frequently. I have never seen any other outlet.

THE COURT: Q. Did you examine it at the time to observe whether there was any other outlet, is the question? A. Well, I was all along the ridge there at the time, and there was no other outlet that I could see.

MR. DENT: Q. Did you follow the course of that outlet west from the meander line? A. Yes, sir.

Q. Did you strike some other depression running towards the lake, or away from the lake, in any other direction—do you remember? A. Well, it run around to the west a little ways, and then turned sharply to the south, and then running for a short distance west, and then turned north again, and ran up into Calumet River, and about here (indicating on the map) where it turns north, my recollection is that there is a slough that extends down to the south as well as north, and this creek or outlet runs north through that slough.

Q. What is that creek called, or outlet, do you remember? A. I don't remember of ever hearing any special name for it.

Q. In representing the west line of water on Hyde Lake, or in reference to representing it, did you meander that west line, or how did you arrive at it, to place it on your map? A. I located it on the ice—made the survey on the ice.

Q. Did you take the open water of the lake in surveying on the ice, or how did you do? A. Yes, sir; about the edge of the clear water—that is, to the edge of the thick grass.

Q. That would be where the water shows open, clear water, and where the grass shows? A. That was where it was comparatively open. It was where there was thick grass. There is, as a matter

of fact, grass for a long ways outside of that, but it was at the edge of the thick grass.

THE COURT: That you call the edge of the lake water? A. The edge of the lake; yes, sir.

MR. DENT: Q Wasn't there ice between that shore line of the water as represented on your map and the meander line? A. Yes, sir; there was water or ice in the marsh west of that.

Q. The grass would be growing in the water on that border strip, would it not? A. Yes, sir.

Q. Did you ascertain how deep the water was in that border strip? A. I did not.

Q. How was it on the east side of Hyde Lake? What were the conditions of ice, and of land, east of the line of the lake as represented on your atlas? How did they compare with those on the west, next the meander line? A. I don't remember specially about whether there was any considerable water there at the time or not. I know on the east bank of Hyde Lake there, I was able to go out to what we call the shore of the lake, during the summer, when there was no ice. I think there was some water east of where we show the line of the lake. There, as on the west side, I took the line at the east side of the lake at the edge of the heavy grass.

Q. Do you know of the land between the timber on the north and the Field house? A. I don't know that name.

Q. Do you know the strip of timber at the north, running into the lake—between the lakes? A. Yes, sir.

Q. And do you remember a house that is further south from the lake—about three-fourths of a mile south? A. I remember that there was a house up there on the ridge, I think, just south of the east and west quarter line of section 20.

Q. About three-fourths of a mile further down, do you remember a house? A. That is, south of this house which I have spoken of?

Q. Yes, sir? A. I don't remember any.

Q. In the space of about three-fourths of a mile north and south, south of the timber and between the two lakes, you can state, if you know or remember, whether the characteristics of land and water and grass were about the same as between the meander line and Hyde Lake on the west? A. I think the character of the land between the two lakes was not as bad as it was on the west side, for this reason—that I was able to get through there without any difficulty in the summer time, and got out to what we call the east side of Hyde Lake, while on the west side of Hyde Lake I was not able to get out to what we call the line of the lake. It ran to a bad marsh there, and I was not able to get out to it.

MR. GREGORY: I wanted to ask the witness what house he spoke of seeing there. You said you saw a house on the strip there, between the two lakes? A. Yes, sir; south of the east and west quarter line of section 20. As to who the occupant was, I don't remember, positively.

Q. South of the east and west quarter line of 20? A. Yes, sir.

Q. You said you did not remember seeing any other buildings south of that. A. Not until we got down to the south line of 29 and 30.

Q. What buildings were there? A. There was a house near that corner—who the occupant was I don't know.

Q. Where was it? A. It was south; I think on either section 31 or 32.

MR. BENNETT: I would like to have the witness give the pages on which sections 19, 20, 29 and 30 are in the atlas.

MR. DENT: I shall object to this atlas. It does not tend to support any issue on the part of Mr. Jordan, and it is offered at an inappropriate time.

THE COURT: Let the objection be noted. Answer the question.

A. Section 19 is shown on pages 45, 46, 47, 48. Section 20 is shown on pages 41, 42, 43, 44. Section 29 is shown on pages 61, 62 and 122. Section 30 is shown on pages 57, 58, 59, 60.

SAMUEL S. GREELEY, called as a witness on behalf of the defendant Jordan, being first duly affirmed, testified as follows:

Direct Examination by MR. BENNETT.

Q. Please give your name? A. Samuel S. Greeley.

Q. What is your business? A. Surveyor.

Q. How long have you been a surveyor? A. Forty-five or forty-six years

Q. Have you published an atlas embracing sections 19, 20, 29 and 30, 37, 15, at any time? A. Yes, sir.

Q. When? A. Published in 1883.

Q. Is the atlas here in court, so far as it relates to those tracts? A. Yes, sir.

Q. What, if any part, did you have in the measurements, making or calculating the measurements, from which that map was made? A. In those particular sections I calculated the traverses, which is the latitudes and departures of the meander line, and of the section lines, and prepared them to be laid down upon the ground.

Q. Did you find any errors in the government notes of 1834 and 1835, so far as relates to the meander line on the southerly part of Hyde Lake? If so, what?

MR. GREGORY: I desire to renew my objection.

THE COURT: Yes; it goes in subject to the objection.

A. There was an error in copy—the certified copy of the United States notes, from which I copied mine, which I found in the office of the custodian, or the recorder, here. That, I believe, was an error simply on that map, and does not exist on other maps. I corrected that error. It was the use of "south" for "north" in one course.

MR. BENNETT: Q. Do you mean that it was an erroneous copy?

A. Apparently, yes, sir; the copy belonging to the recorder of the county was wrong in that particular, as I understand. I think other copies show the course correctly, north 61¼ west, instead of 61¼ south. I found that error in a certified copy from which mine was taken, and I corrected it on mine.

Q. Here is a certified copy of the government notes of 1834 and 1835. Look and see whether those courses are there, as you found them when you ran the meander line, or whether they were correct? (handing same to witness). A. This is correct on this copy. It is now 61¼ west, 13 chains and 68 links. I found it from the copy here, which was obtained from the custodian at Springfield. This is correct.

Q. I will ask you how generally your map has been in use since you published it? A. It has been in very general use, I think; I see it in a good many of the real-estate offices and law offices and public offices. The Village of Hyde Park at that time took six or seven copies—six copies, I think, for municipal use there.

Q. Is it used by the City of Chicago, so far as that territory is concerned, now? A. Yes, sir; I understand so. I think those copies were transferred to the city.

Q. Would you say that is a correct map, so far as made, of those sections? A. Yes, sir.

Q. Referring you, Mr. Greeley, to the closing remarks of the northerly meander line north of Hyde Lake, which you find, by referring to the map, "land all marsh; water from six inches to three and a half feet deep," would you say, as a surveyor, that that language should be construed as relating back to the fractional corner of 19 and 20, preceding those courses? A. I understand that in each section the surveyor indicates by remarks the general character of the soil in that section. He has done so in the preceding notes. Here he says in the survey: "Thence from said corner to fractional sections 19 and 20, along the northerly margin of lake along fractional section 20," and so on, and then he goes on several courses, and at the end of that he seems to make the general remark: "Land all marsh; water from 6 inches to 3½ feet deep." I suppose that is an indication of the general character of the ground that he traversed in that section. I should understand it so. If he had gone over land entirely different from that—ridge land, or land of a different character—I think he would have made a note of it.

Q. He should have done so, in your opinion, should he? A. I should think so, without doubt; yes sir.

THE COURT: Q. Relates back to the last station? A. It relates to the general land that he has surveyed at that time.

Q. The whole section? A. The whole section, so far as he passed over it.

MR. GREGORY: Q. It was a quarter section, really, wasn't it? A. So far as he passed over it.

Q. What land is that, Mr. Bennett?

MR. BENNETT: It commences previous to the nine courses there at the last.

THE COURT: Does he say it relates back through those nine courses, or does it relate to the whole quarter section?

A. Those nine courses indicate what he passed over of that section, and this would relate to that strip which he passed over, as I understand.

MR. BENNETT: Q. And not to any other portion of the section than the land he passed over? A. That which he observes as he goes along.

THE COURT: The last station on these nine courses? A. Yes, sir. Those courses foot up here apparently about eighty-nine chains, and he makes that general remark about that which those courses passed through.

MR. BENNETT: Q. Upon the hypothesis that the land was substantially the same as when the government survey of 1834 and 1835 was run, that you have shown it on your map in 1882 and 1883, or that there has been no substantial change, was it, in your opinion, the duty of the surveyor to have meandered out Wolf Lake by running a line along its western edge?

Objected to by MR. GREGORY; objection sustained.

* * * * *

Cross-Examination by MR. GREGORY.

Q. This note says, Mr. Greeley, "to the temporary post set by me on the line between Indiana and Illinois, intersection of said line with the lake. Land all marsh; water from 6 inches to 3½ feet deep." What land do you understand that note to refer to: "Land all marsh"? A. The portion which the man traversed in that section in his survey of that fractional section.

Q. Do you mean where the meander line ran? A. Yes, sir.

Q. That is to say, the tract which he walked over was all marsh? A. Yes, sir; not necessarily the narrow tract, but as he observed it going along. He might have looked each side of him; probably did.

Q. It don't refer particularly to the land enclosed in the meander, does it? A. There is no land enclosed in the meander. You mean between that and the section line?

THE COURT: I understand him to say it refers to the land where the meander line ran. A. Yes, sir; what he could see as he went along each side of him. That was the character of the land. "Land all marsh."

MR. GREGORY: Q. But he could see on each side of the meander line, you say? A. Yes, sir.

Q. How far could he see? A. Well, I don't know how far he could see. I don't know how far he did see.

Q. Here a man walks along (indicating). Take, for instance, this rail as a meander line. Walking along there, marsh to the

right of him and marsh to the left of him. Would that not indicate all marsh? A. Yes, sir.

Q. "Water from six inches to three and one-half feet deep." Does that indicate that there were varying depths to the water there that he observed on the land? A. Yes, sir.

MR. BENNETT: Q. Do you include the particular line over which he went? A. Yes, sir.

THE COURT: It appears to me the construction would be that where he went, where the line ran, it was all marsh.

MR. GREGORY: I should think so.

* * * * *

Mr. Goudy offered a stipulation which is in the words and figures as follows:

Stipulation in Circuit Court of Cook County as to Vacation of Judgments in the Circuit Court of the United States.

It is stipulated and agreed that the judgments rendered by the Circuit Court of the United States for the Northern District of Illinois, in suits of ejectment in one of which Charles H. Mitchell was a plaintiff and Jabez G. Smale and others were defendants, and in the other Gertrude H. Hardin was plaintiff and Conrad N. Jordan was defendant, have been vacated and set aside under the provisions of the statute of Illinois on the application of the defendants in the said suits,

And it is further stipulated and agreed that said fact is to be treated with the same force and effect as if supplemental answers were filed herein to the amended petitions of Charles B. Shedd and Gertrude H. Hardin, answering the averments thereof which set up said judgments in ejectment as a bar, and the said fact is to be treated as if proved by the production of the proper certified copies from the records of said United States Circuit Court.

July 8, 1892.

THOMAS DENT,
Attorney for Gertrude H. Hardin.
S. S. GREGORY,
For Shedd.
W. C. GOUDY,
For Jordan and Others.

Which was all the evidence offered or received on the trial of the said cause.

SUPREME COURT OF ILLINOIS,
CENTRAL GRAND DIVISION.

Filed Feby. 15, 1893.

E. A. SNIVELY,
Clerk.

DECREE

In the Circuit Court of Cook County, August 10, 1892.

CIRCUIT COURT OF COOK COUNTY.

CHARLES B. SHEDD *vs.* ELIZABETH P. THOMAS *et al.* } B. R. 442.

SAME *vs.* J. ENSIGN FULLER *et al.* } B. R. 443.

The above cases having been consolidated and coming on to be heard as one case upon the petitions herein, the answers thereto, the replications to such answers, the cross-petitions filed herein, the answers thereto, and the replications to such answers, and the proofs, oral, documentary and written, taken and heard in said cause, and having been argued by counsel for the respective parties, and the court having duly considered the same, and being fully advised in the premises—

Doth find as matter of fact:

That on the first day of October, in the year 1855, the United States of America, by its patent, in the due form dated on that day, granted and conveyed to Stephen A. Douglas, fractional section twenty-nine (29), in township number thirty-seven (37) north, range fifteen (15) east of the third principal meridian, in the County of Cook and State of Illinois. That all the right, title and interest in and to said premises, acquired by said Douglas through said patent, has, by various mesne conveyances, as alleged in said petition, passed to and been acquired by the said petitioner, Charles B. Shedd, and is, and at the commencement of this proceeding was, in him, said Shedd.

That the public records of said Cook County were destroyed by fire on or about the ninth day of October in the year 1871, including the records of certain of the conveyances through which the said petitioner deraigns title from the said Douglas.

That on the first day of March, in the year 1850, the United States of America, by its patent in due form dated on that day, granted and conveyed to Horatio B. De Witt the southwest fractional quarter of fractional section twenty (20), in township thirty-seven (37) north, of range fifteen (15) east of the third principal meridian, also in the County of Cook and State of Illinois.

That all the right, title and interest in and to said premises acquired by said De Witt through said patent has by various mesne conveyances, as alleged in said petition, passed to and been acquired by the said petitioner, Charles B. Shedd, and is, and at the time of the commencement of this proceeding was in him, said Shedd.

That in the fire by which the public records of Cook County were destroyed, the records of certain deeds purporting to convey said last described premises were burned.

That the said Gertrude H. Hardin became seized in fee simple of certain tracts of land situated in the county aforesaid, known and described in the patent therefor, which was issued to John Holbrook on the 20th day of May, A. D. 1841, as follows, to wit: The southeast fractional quarter and the east fraction of the southwest fractional quarter of section nineteen (19), and the northeast fractional quarter and the east fraction of the southeast fractional quarter of section thirty (30), in township thirty-seven (37) north, range fifteen (15) east, in the district of lands subject to sale at Chicago, Illinois, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General. That a certificate of the entry of said lands was issued to John Holbrook, the father of the said Gertrude H. Hardin, December 24, 1838. That said survey with reference to which said plat was made, was made in the years 1834 and 1835. That according to the said plat the southeast fractional quarter of section nineteen (19), and northeast fractional quarter and the east fraction of the southeast fractional quarter of section thirty (30), were situated on the borders of a lake, designated on the plat "Navigable Lake," but which then was and is in fact a non-navigable lake. That said lake was meandered for the purpose of ascertaining the quantity of the upland to be charged for, and not for the purpose of limiting the title of the patentees to the meander line, the lake or waters thereof constituting the boundary.

That the said Gertrude H. Hardin derived title to the aforesaid tracts of land in part as the sole heir at law of the said John Holbrook, who died intestate on or about the 1st day of December, 1866, and in part by certain mesne conveyances alleged in her petition, giving her all the right, title and interest which were vested in said John Holbrook by such patent.

That the west fraction of the southeast quarter of section thirty (30), in township and range aforesaid, was granted by patent from United States to William B. Egan, bearing date August 1, 1853, and was one of the tracts bounded by said lake in and by said official survey of 1834 and 1835. That the title to said tract did under and by certain mesne conveyances pass from the said William B. Egan to William H. Rand and Charles R. Steele derivatively, and thereafter, to wit: on the 20th day of December, 1889, there was executed to the said Gertrude H. Hardin a certain deed of conveyance from said William H. Rand and his wife, and also from Nelson A. Steele and Margaret A. Steele, in their own right, and as executor and executrix of the last will and testament of Charles R. Steele, deceased, whereby the grantors in said deed conveyed to said Gertrude H. Hardin all their interest in that part of the south half of section thirty (30), aforesaid, which is east of a line eighty rods east of and parallel with the line running north and south through the center of said section 30, it being the intent of the grantors in said deed to bound the premises thereby granted upon the south by a line extended from the south east corner of said

section west along the section line to a point eighty rods east of and parallel with said north and south center line of said section.

That prior to the survey by the United States, hereinbefore mentioned, the proprietary right to the lands in question and to the lake bed, and also to the lake itself, was in the United States. That after such survey the lands in said township were regularly brought into the market and disposed of in pursuance of the acts of Congress in such case made and provided, according to the official plat of such survey, without any reservation on the part of the United States in respect to the lake bed, or any part of the same, and that said lake bed passed to the patentees or grantees from the United States, who thereupon became and were seized of all the proprietary rights to the extent of their interests in the said lands of the United States in respect to the lake and lake bed. That the United States could not, after having so disposed of its proprietary right, limit or restrict the same. That the attempted survey of the lake bed in 1874, under claim of authority from the Commissioner of the General Land Office or local land officers, was unauthorized, and that the attempted conveyance by patents, based upon such survey, were without authority of law, and are illegal and void.

That the patentees from the United States under the survey of 1834 and 1835 of lands bounded by said lake, took to the center of the lake ratably.

That the survey of 1874 was based upon the correctness of the survey of 1834–5, but was ordered on the theory that the meander line was a line of boundary, and that parts of the lake had become by the recession of the waters dry lands and subject to cultivation, and that the United States owned the same. But this court finds, as aforesaid, that the meander line was not a line or boundary, and that the said survey of 1874 was unauthorized.

Wherefore, as against all parties claiming adversely to the said Gertrude H. Hardin and to the Cook County Canal and Dock Company, respectively, other than the said Charles B. Shedd, the court finds and holds such adverse claim or claims to be void in so far as the same are based on said survey of 1874, or under the supposed proceedings in the General Land Office resulting in the supposed patents based on such survey.

That both the patents to said Douglas and to said DeWitt, under which said petitioner Shedd claims, and the patent to Holbrook and the patent to said Egan, under which cross-petitioner Gertrude H. Hardin claims, were based upon a survey made by the United States in the years 1834 and 1835, and referred to a plat made from said survey, which with the field notes of said survey showed a lake as the westerly and southerly boundary of said southwest fractional quarter of said fractional section 20 and the easterly and northerly boundary of said fractional section 29.

That said lake in fact, and as shown by the plat, extends easterly beyond the state line between Indiana and Illinois into the former

state; that it was as shown by the plat circular in general outline, and that a north and south line dividing it in the center would lie just east of the state line, which latter line is a little less than one mile east of the north and south section line between sections 30 and 19 and sections 29 and 20.

That at the time of the government survey in 1834 and 1835 the point of land shown on the plat as the southwest fractional quarter of fractional section 20 aforesaid, extended in a southwesterly direction to the south line of said section; that the ridge or point of land forming the northerly portion of said fractional section 29 extended north or northeasterly to the north line of the southwest quarter of said section.

That the east fraction of the southeast quarter of section 30 formed a part of this ridge and extended north to the north line of the south half of the southwest quarter of section 29.

That north of the north line of the south half of said section up to the south line of said section 20, the land was at the time of said government survey in 1834 and 1835 covered by the water of the lake, so that at that time there was here but one lake extending, as shown on the official plat, from the west line of the lake to the state line. That the survey of 1874 was obtained upon affidavits untruly alleging that the bed of this lake was land fit for cultivation.

And the court doth further find that the sale of November 9, 1876, of fractional southwest quarter of said section 20 for an installment of a South Park assessment, and the deed made thereon to the South Park Commissioners, dated August 1, 1879, are irregular, illegal and void.

And that the sale of December 3, 1874, of ten acres in said fractional section 29 for an installment of a South Park assessment, and the deed thereon to Rouel W. Bridge, of August 1, 1877, are likewise irregular, illegal and void.

And that the sale of Sepember 30, 1880, of said fractional section 29, for an installment of a South Park assessment, and the deed thereon to D. J. Hubbard of November 8, 1883, are likewise irregular, illegal and void.

And that the sale of October 4, 1880, of said fractional section 29, for the taxes of 1879, and the deed thereon to James W. Converse of July 2, 1884, are likewise irregular, illegal and void.

And that the sale of September 12, 1881, of said fractional section 29, and the deed thereon to James W. Converse of July 2, 1884, are likewise irregular, illegal and void.

And the sale of September , 1884, of the north half of the northwest quarter of said section 29, for the taxes of 1883, and the deed thereon to James W. Converse of October 30, 1886, are likewise irregular, illegal and void.

And that the sale of September 25, 1884, to William K. Reed of the east half of said fractional section 29 for the taxes of 1883, is

likewise irregular, illegal and void. And the purchaser at such sale is not entitled to a deed thereon.

And that the sale of September 22, 1884, to William K. Reed, of lots 1, 2, 3 and 4 of the said east half of said fractional section 29 for the taxes of 1884 is likewise irregular, illegal and void, and the purchaser at such sale is not entitled to a deed thereon.

And the court doth further find that all of said tax sales and deeds as aforesaid are clouds upon the title of the petitioner Charles B. Shedd and the cross-petitioner Gertrude H. Hardin to the property by them claimed herein, and as such ought to be annulled, vacated and set aside, but upon condition that the parties in interest pay to the holders of the said tax titles the money paid at such tax sales, together with costs and taxes paid by the holder of the tax certificates, with interest at six per cent., together with their costs in this suit.

And for the purpose of ascertaining the sums so to be paid by said Shedd and Gertrude H. Hardin respectively, it is further ordered, adjudged and decreed by the court that this matter be referred to Walter Butler, Esq., one of the masters in chancery of this court, to hear proofs and determine said matter and to report his findings and conclusions to this court with all convenient speed.

And that on the coming in and confirmation of said report and the final ascertainment by the court of the sums so to be paid and on the payment thereof, either to the holders of said tax claims or to the clerk of this court for their use, and due proof to the court of such payment, which payment shall be made within sixty days from such final ascertainment, that all of the said tax sales, certificates thereof and deeds be and the same are hereby vacated, set aside and annulled as clouds upon the title of said petitioner, and the same are and are hereby adjudged and decreed by the court to be of no force, virtue or effect whatever. And that the certificates issued to William K. Reed of sales for taxes as aforesaid, made September 25, 1884, and September 22, 1884, of certain portions of said premises as above particularly set forth, be delivered up to be canceled.

And the court doth further find as matter of fact that there was not possession adverse to petitioner by actual residence for seven years prior to the bringing of this suit of the property, or any thereof, claimed by the said petitioner in his said petition, and that John Forsythe did not purchase the tract of land containing 7 37/100 acres within the meander lines of the said fractional section 29 for and on behalf of Charles Reese, as alleged in the answer of the Illinois Land and Loan Company.

That the several defenses asserted or set up under the limitation laws as against the said Gertrude H. Hardin and said Cook County Canal and Dock Company, respectively, are not sustained, nor are the same good in law.

That the several supposed tax titles set up or asserted as claims in opposition to the cross-petition of said Gertrude H. Hardin, to

wit: The supposed tax titles or claims set out in the answer of Fred F. Bennett and John I. Bennett, under deeds issued to the South Park Commissioners, dated August 1, 1879, and March 8, 1882, as upon a sale made November 9, 1876, of fractional northeast quarter of section 30, or some supposed part thereof, and the four supposed tax deeds referred to in the answer of J. Ensign Fuller, to wit: A deed to David G. Hamilton, of date September 6, 1875; a deed to said Hamilton of date March 5, 1877; a deed to Polemus D. Hamilton of date May 31, 1877, and a deed to one Hamilton of date July 23, 1880; and the alleged tax sale of September 19 or 20, 1883, whichever sale was for taxes not since paid, to William K. Reed, are each and all invalid and void and are subject to be removed as clouds as is hereinafter provided. That as to said tax sale of September 19 or 20, 1883, to Wm. K. Reed, and as to the several tax deeds or claims under said supposed tax deeds to the South Park Commissioners of date August 1, 1879, and March 8, 1882, and the said several deeds to David G. Hamilton and Polemus D. Hamilton respectively, under date of September 6, 1875, March 5, 1877, May 31, 1877, and July 23, 1880, respectively, the court requires the said Gertrude H. Hardin to pay to the parties respectively holding such tax deeds or certificates, or showing a right to claim thereunder, all the taxes and legal costs, with interest thereon to date, as a condition of removing the cloud of such tax deeds and claims.

And for the purpose of ascertaining the sum to be paid by the said Gertrude H. Hardin to the holders of such tax deeds, or to the persons having legal right to claim thereunder, it is further ordered, adjudged and decreed, that this matter be referred to Walter Butler, Esq., one of the masters in chancery of this court, to hear proofs and determine said matter and report his findings and conclusions to this court with all convenient speed and on the coming in and confirmation of such report, and the final ascertainment by the court of the sums so to be paid, and on the payment thereof to the parties, respectively, or to the clerk of this court for their use, within sixty days from such final ascertainment by the court, all of the tax sales, and sales for special assessments, respectively, and all the deeds based thereon or growing out of the same, shall be and the same are hereby vacated, set aside and annulled as clouds upon the title of said Gertrude H. Hardin, and the same are hereby adjudged and decreed by the court to be of no force, virtue or effect, whatever.

It is therefore further ordered, adjudged and decreed by the court that the said petitioner, Charles B. Shedd, do have and recover all the land, whether submerged or not, in the said southwest fractional quarter of said fractional section 20 and the southeast fractional quarter of fractional section 19, in township 37 north, range 15, east of the third principal meridian, in Cook County, Illinois, which lies to the easterly of the middle line of the body of water commonly known as Hyde Lake, lying in part in said

quarter section and having been originally a bay of Wolf Lake, said line to be run, taking as a guide, so far as practicable, the meander line as shown by the government survey of 1834 and 1835, and treating the same as a shore line by measurement from which said middle line is to be ascertained. And the title of the said petitioner in and to the same is hereby established and he is hereby adjudged and decreed by the court to be seized thereof as of an indefeasible estate of inheritance in fee simple, as well against all the parties hereto and all persons claiming or to claim under them or either or any of them as against all the world.

And it is accordingly further ordered, adjudged and decreed by the court that the said petitioner, Charles B. Shedd, do have and recover all the land, whether submerged or not, in the south half of said fractional section 29, in township 37 north of range 15 east of the third principal merdian in Cook County, Illinois, the north and south boundary lines of said tract being extended to the state line between Illinois and Indiana, and also all of the land, whether submerged or not, which would be included between the west line of the northwest quarter of the southwest quarter of said section 29, an east and west line run from the southwest corner of said quarter-quarter to the middle line of the bay to the west of said tract, the middle line of said bay, and another east and west line from the northwest corner of said quarter section to the middle line of said bay, being so much land, whether under water or not, as lies directly west of said northwest quarter of the southwest quarter of said section 29 and between that tract and the middle line of said bay, the meander line of the government survey of 1834 and 1835 to be used as a guide in establishing this middle line.

And the title of the said petitioner in and to the same is hereby established and declared, and he is hereby adjudged and decreed by the court to be seized thereof as of an indefeasible estate of inheritance in fee simple, as well against all the parties hereto and all persons claiming or to claim under them, or either or any of them, as against all the world.

And it is further ordered, adjudged and decreed by the court that all of the defendants herein and all parties in possession of said lands so awarded to said Shedd as aforesaid, or of any part thereof, do forthwith surrender and yield up immediate possession thereof to him, said petitioner.

It is considered, ordered and adjudged by the court that the said Gertrude H. Hardin have and recover the east fraction of the southwest fractional quarter and the southeast fractional quarter of section nineteen (19) aforesaid, and the northeast fractional quarter and east fraction of the southeast fractional quarter of section thirty (30); except the right of way through said southeast quarter of section nineteen (19) and northeast quarter of section thirty (30), granted by said Gertrude H. Hardin and Isaac N. Hardin, her husband, to the South Chicago and Southern Railroad Company,

by deed bearing date December 24, 1886, and recorded in the recorder's office of said county January 19, 1887, and also except a strip of land four hundred (400) feet wide to be taken from the south side of the southeast quarter of said section nineteen (19), and the south side of said section twenty (20), according to a certain deed from said Gertrude H. Hardin and Isaac N. Hardin to the Cook County Canal and Dock Company, bearing date August 30, 1884; and except also so much of said southeast fractional quarter of section nineteen as lies to the east of said middle line of Hyde Lake; and in fixing the extension into the lake of the tracts so owned by said Gertrude H. Hardin, it is further considered, ordered, adjudged and decreed by the court that the said Gertrude H. Hardin have, hold and recover, with the exception of said right of way and the said strip of 400 feet, all the land whether submerged or not, which lies to the westerly of the middle line of the said bay of Wolf Lake between the southwest fractional quarter of section twenty (20), and the southeast fractional quarter of section nineteen (19), such middle line to be surveyed or determined in the manner above stated, with refereuce to determining the westerly boundary of the southwest fractional quarter of section twenty (20) as awarded to the petitioner Shedd as aforesaid. And the title of said right of way so vested in the South Chicago and Southern Railroad Company is hereby quieted and confirmed according to the purport of the deed to said company for the same, and the title of the Cook County Canal and Dock Company to said strip of 400 feet as described in said deed to said company is hereby established and confirmed as a title in fee simple, according to the purport of said deed to said company, saving and excepting that said strip is held to extend eastward only to the middle of said bay lying eastward of said southeast quarter of said section nineteen (19), the easterly half of said bay being allotted to said Charles B. Shedd by a line to be run to divide the same as is above provided.

Also, that the said Gertrude H. Hardin have and recover the northeast fractional quarter of section thirty (30), in the township and range aforesaid, and that the same be held to embrace and include all the land, whether submerged or not, extending eastward from said congressional subdivision to the state line of Indiana, the lines of said quarter section originally bounding it on the north and south, respectively, being extended as the north and south boundary lines, respectively, of said tract to said state line.

Also, that the said Gertrude H. Hardin have and recover all the lands, whether submerged or not, in the northeast quarter of the southeast quarter of section 30, aforesaid, lying west of the westerly line of the land awarded as aforesaid to said Shedd, as a part of the northwest quarter of the southwest quarter of section twenty-nine (29) aforesaid.

Also, that said Gertrude H. Hardin have and recover the southeast quarter of the southeast quarter of said section thirty (30),

leaving to said William H. Rand and the executors and trustees under the will of Charles R. Steele, deceased, and their legal representatives respectively, all that part of the southeast quarter of section thirty (30) aforesaid which lies west of a line drawn north and south from a point on the south line of said quarter section as extended into said bay eighty rods distant from and parallel with the north and south center line of said section.

It is further ordered, adjudged and decreed, that the said petitioner Shedd and the said cross-petitioner Gertrude H. Hardin, shall take and hold title to land under water hereby awarded to them respectively, subject to the right, if any, of shore owners upon said lakes, to use in common the waters of said lake for purposes of fishing and boating and similar usual and customary use, but that the right to cut ice in said lakes may be exercised only by owners of the bed of the lake over which such ice is formed, and no reservation is hereby made in any way to impair that right.

And it is further ordered that the several cross-petitions of John I. Bennett, Andrew Crawford, Elizabeth P. Thomas, Conrad N. Jordan, J. Ensign Fuller, F. Cleveland, F. I. Bennett, James W. Converse and Charles E. Rand, and all cross-petitions filed herein except those of cross-petitioner Gertrude H. Hardin, be dismissed for want of equity, and that each party hereto pay his or her own costs, except the holders of tax receipts and tax deeds.

It is further ordered, adjudged and decreed that all parties hereto who were in possession of any part of the premises awarded to the said Charles B. Shedd, Gertrude H. Hardin and the Cook County Canal and Dock Company, respectively, as aforesaid, and any party and parties who have come or may come into possession of any part of the premises, respectively, so awarded to Charles B. Shedd, Gertrude H. Hardin and the Cook County Canal and Dock Company, respectively, shall, upon being served with a copy of this decree, surrender possession to the said Charles B. Shedd, Gertrude H. Hardin and the Cook County Canal and Dock Company, respectively, as to the several tracts awarded them respectively, and in default of such surrender leave is given to apply to the court for a writ of possession as against any person or persons so failing or refusing to surrender possession.

And thereupon Conrad N. Jordan, J. Ensign Fuller, John I. Bennett and Frank I. Bennett prayed an appeal to the Supreme Court, which is allowed, and the penalty in the bond is fixed at five hundred dollars, and is to be filed with security to be approved by the court within thirty days. And it is further ordered that sixty days be allowed for the filing of a certificate of evidence.

And by consent of the parties in open court it is ordered that the appeals herein be prosecuted to the next term of the Supreme Court in the Central Grand Division.

Assignment of Errors by Part of Appellants, on First Appeal.

In the Supreme Court of Illinois, Central Grand Division.

January Term, A. D. 1893.

J. ENSIGN FULLER, CONRAD N. JORDAN, JOHN I. BENNETT, FRANK I. BENNETT, *Appellants*,
vs.
GERTRUDE H. HARDIN AND CHARLES B. SHEDD, *Appellees.*
} Appeal from the Circuit Court of Cook County.

And now comes J. Ensign Fuller, Conrad N. Jordan, John I. Bennett and Frank I. Bennett, appellants, by W. C. Goudy and Frank I. Bennett, their solicitors, and say that in the record and proceedings, and in rendering the decree aforesaid, there is manifest error in this, to-wit:

1. The court below admitted improper evidence on the part of the appellees.

2. The court below rejected proper evidence on the part of the appellants.

3. The court below erred in rendering a decree in favor of said appellees and against these appellants.

4. The court erred in finding that the United States by patent conveyed the land described in said decree to Stephen A. Douglas in October, 1856, and the same by mesne conveyances was now vested in Charles B. Shedd, one of the appellees.

5. The court erred in finding that the records of such conveyances were destroyed by fire in 1871.

6. The court erred in finding that the United States by patent in March, 1850, conveyed the land described in said decree to Horatio B. DeWitt, and that said land by mesne conveyances has been acquired by Charles B. Shedd, and that the records of such transfers have been destroyed by fire.

7. The court erred in finding that Gertrude H. Hardin became seized in fee simple of the certain lands described in said decree, and described in a certain patent issued to John Holbrook on the 20th day of May, 1841, and erred in finding that said lands were situated on the borders of a lake which was non-navigable; that said lake was meandered for the purpose of ascertaining the quantity of upland to be charged for and not for the purpose of limiting the title of the patentees to the meander line.

8. The court erred in finding that Gertrude H. Hardin derived title to the aforesaid lands as heir of John Holbrook, deceased, and by mesne conveyances.

9. The court erred in finding that certain other lands were conveyed by the United States to William B. Egan, and by mesne conveyance where transferred to William H. Rand and Charles R. Steel and were then conveyed to and now are vested in Gertrude H. Hardin.

10. The court erred in finding that there was no reservation by the United States in respect to the lake bed, and that such lake bed passed to the patentees, and the United States could not restrict their rights.

11. The court erred in holding that the survey of 1874 was void, and that conveyances based thereon were also void.

12. The court erred in holding that the patentees from the United States under the surveys of 1834 and 1835 of lands bounded by said lake took to the center of the lake.

13. The court erred in holding that the meander line was not a line of boundary.

14. The court erred in finding and decreeing that all titles based upon the survey of 1874 are null and void, and all of appellants' claims thereunder are null and void.

15. The court erred in holding that the two lakes described in the record were one lake in 1834 and 1835.

16. The court erred in finding that there was no possession adverse to petitioner Shedd and cross-petitioner Hardin by actual residence for seven years.

17. The court erred in decreeing that Charles B. Shedd do recover the land described in the decree and establishing the title thereto in him.

18. The court erred in decreeing that Gertrude H. Hardin recover the land decreed to her in the decree and establishing title thereto in her.

19. The court erred in dismissing the cross-petitions of appellants, and erred by not granting the prayer of said cross-petitions as therein prayed. And for other errors apparent on the face of the record.

By reason whereof the appellants pray said decree may be reversed, etc.

W. C. GOUDY and
FRANK I. BENNETT,
Solicitors for Appellants.

And afterwards, to wit, on the 17th day of January, in the year of our Lord one thousand eight hundred and ninety-six, an order was made by the said Supreme Court of Illinois in words and figures following, to wit:

J. ENSIGN FULLER, CONRAD N. JORDAN, JOHN I. BENNETT AND FRANK I. BENNETT
Appellants,
vs.
CHARLES B. SHEDD AND GERTRUDE H. HARDIN,
Appellees.
} Appeal from the Circuit Court of Cook County.

On this day come again the said parties, and the Court having diligently examined and inspected as well the record and proceedings

aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, it is considered by the Court that the motion heretofore made to reverse the Decree is in part allowed, and the motion heretofore made to affirm the Decree is in part allowed, and it is further ordered by the Court that the Decree aforesaid be affirmed in part and in part reversed, and said cause is remanded to the Circuit Court for such other and further proceedings as shall to justice and law appertain.

And it is further considered by the Court that the said appellants pay the sum of $52.76, and said appellee, pay the sum of $9.80, costs in this behalf expended, and that execution issue therefor.

And at the said date, at the same term of said Supreme Court, an Order or Judgment was by said Court entered in the case of one of the aforesaid appeals in the words and figures as follows, to wit:

ELIZABETH P. THOMAS *vs.* CHARLES B. SHEDD. } Appeal from Cook.

On this day come again the said parties, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, it is considered by the Court that the motion heretofore made to reverse the Decree is in part allowed, and the motion heretofore made to affirm the Decree is in part allowed, and it is therefore ordered by the Court that the Decree aforesaid be affirmed in part and in part reversed, and said cause is remanded to the Circuit Court for such other and further proceedings as shall to justice and law appertain.

And it is further considered by the Court that the said appellant pay the sum of $52.76 and said appellee pay the sum of $9.80, costs in this behalf expended, and that execution issue therefor.

And at the said date, at the same term of said Supreme Court, an Order or Judgment was by said court entered in the case of one of the aforesaid appeals, in the words and figures as follows, to-wit:

THE SOUTH CHICAGO AND SOUTHERN RAILROAD COMPANY *vs.* CHARLES B. SHEDD AND GERTRUDE H. HARDIN. } Appeal from Cook.

On this day come again the said parties, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, it is considered by the Court that the motion heretofore made to reverse the Decree is in part allowed, and the motion heretofore made

to affirm the Decree is in part allowed, and it is therefore ordered by the Court that the Decree aforesaid be affirmed in part and in part reversed, and said cause is remanded to the Circuit Court for such other and further proceedings as shall to justice and law appertain.

And it is further considered by the Court that the said appellant pay the sum of $52.76, and said appellees pay the sum of $9.80, costs in this behalf expended, and that execution issue therefor.

And at the said date, at the same term of said Supreme Court, an Order or Judgment was by said Court entered in the case of one of the aforesaid appeals, in the words and figures as follows, to-wit:

CHARLES E. RAND *vs.* GERTRUDE H. HARDIN. } Appeal from Cook.

On this day come again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, it is considered by the Court that the motion heretofore made to reverse the Decree is in part allowed, and the motion heretofore made to affirm the Decree herein is in part allowed; and it is therefore ordered by the Court that the Decree aforesaid be affirmed in part and in part reversed, and said cause is remanded to the Circuit Court for such other and further proceedings as shall to law and justice appertain.

And it is further considered by the Court that the said appellant pay the sum of $52.76, and the said appellee pay the sum of $9.80, costs in this behalf expended, and that execution issue therefor.

And at the said date, at the same term of said Supreme Court, an Order or Judgment was by said Court entered in the case of one of the aforesaid appeals, in the words and figures as follows, to-wit:

FRANKLIN A. CLEVELAND *vs.* GERTRUDE H. HARDIN. } Appeal from Cook.

On this day come again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, it is considered by the Court that the motion heretofore made to reverse the Decree is in part allowed, and the motion heretofore made to affirm the Decree herein is in part allowed; and it is therefore ordered by the Court that the Decree aforesaid be affirmed in part and in part reversed, and said cause is remanded to the Circuit Court for such other and further proceedings as shall to law and justice appertain.

And it is further ordered by the court that the said appellant pay the sum of $52.76, and the said appellee pay the sum of

$9.80, costs in this behalf expended, and that execution issue therefor.

And thereafter, to wit: on the 25th day of June, 1896, there was entered in said Circuit Court of Cook County, in the words and figures following, to-wit:

Order Redocketing the Cause.

In the Circuit Court of Cook County.

CHARLES B. SHEDD
vs.
ELIZABETH P. THOMAS, CONRAD N. JORDAN, FRANK I. BENNETT, JAMES W. CONVERSE, ANDREW CRAWFORD, CHARLES H. WISNER, GERTRUDE H. HARDIN, THE SOUTH CHICAGO AND SOUTHERN RAILROAD COMPANY, WILLIAM BU[illegible], JAMES W. SMITH, JOHN E. CURTIS, SAMUEL DAVIS, THOMAS WILKERSON, SOLOMON FIELD AND THE UNKNOWN HEIRS AND DEVISEES OF CHARLES D. GILMORE, AND ALL WHOM IT MAY CONCERN.

No. 442.
Petition under Burnt Records Act.

CHARLES B. SHEDD
vs.
J. ENSIGN FULLER, CONRAD N. JORDAN, JOHN I. BENNETT, FRANK I. BENNETT, HENRY M. ALEXANDER, ASHBELL GREEN, GERTRUDE H. HARDIN, TREAT CAMPBELL, THE SOUTH CHICAGO AND SOUTHERN RAILROAD COMPANY, COOK COUNTY CANAL AND DOCK COMPANY, WILLIAM K. REED, JABEZ G. SMALE, AND ALL WHOM IT MAY CONCERN.

No. 443.
Petition under Burnt Records Act.

And now, on this day come again the parties to the above entitled causes by their counsel, and also now comes on to be heard the written motion of the petitioner Charles B. Shedd for an order reinstating and redocketing the said causes, and the Court having inspected the said motion in writing, and it appearing to the Court that said causes and petitions were originally instituted and filed in this Court, and that afterwards and during the progress thereof said causes were, by the order of this Court, consolidated; that aft-

erwards a single decree was rendered by this Court in said causes as consolidated, and that afterwards separate appeals were taken from said decree to the Supreme Court of Illinois, by the said defendants, namely, J. Ensign Fuller, Conrad N. Jordan, John I. Bennett, Frank I. Bennett, the South Chicago and Southern Railroad Company, Charles E. Rand, Elizabeth P. Thomas, Franklin A. Cleveland. That in and by the said Supreme Court the said appeals were docketed, carried on, heard and decided by and under the following titles and denominations:

J. Ensign Fuller, Conrad N. Jordan, John I. Bennett and Frank I. Bennett
vs.
Charles B. Shedd and Gertrude H. Hardin.

Elizabeth P. Thomas
vs.
Charles B. Shedd.

The South Chicago and Southern Railroad Company
vs.
Charles B. Shedd and Gertrude H. Hardin.

Charles E. Rand
vs.
Gertrude H. Hardin.

Franklin A. Cleveland
vs.
Gertrude H. Hardin.

And it further appearing that afterwards, to-wit: on the 17th day of January, A. D. 1896, said decree was by the order, opinion and decision of said Supreme Court in part affirmed, and in part reversed, and that said causes, as docketed, entitled, denominated, heard and decided by said Supreme Court, were remanded to this Court for further proceedings in conformity with the said Opinion

And it appearing to the Court that due notice has been given to all parties entitled thereto of the motion to reinstate and redocket said causes, and it further appearing that the said transcripts of the said remanding orders, together with a true copy of the said Opinion, have been duly filed in this Court; and the Court being further advised in the premises, does order that said causes be reinstated and redocketed in this Court by, with and under the titles and denominations as they originally stood in this Court and as they stood when appeals were taken as aforesaid from said decree.

O. K.—Dent & Whitman, with Moran, Kraus & Mayer; H. S. Robbins, for Fuller *et al.*; Marston, Auger & Tuttle, for E. P.

Thomas; W. R. Plum, Solicitor, Chas. E. Rand, Frank J. Loesch, for So. Chicago & So. R. Co.; S. P. Douthart, Sol. for Cleveland.

(Endorsed) Entered June 25, '96. M. F. T.

2. From the transcript or record from the Circuit Court of Cook County filed in said Supreme Court, October 6, A. D. 1897.

Certificate of Evidence.

In the Circuit Court of Cook County.

CHARLES B. SHEDD, *Petitioner*, *v.* ELIZABETH P. THOMAS *et al.*	B. R. 442	Consolidated.
CHARLES B. SHEDD, *Petitioner*, *v.* J. ENSIGN FULLER *et al.*	B. R. 443.	
GERTRUDE H. HARDIN, *v.* CONRAD N. JORDAN *et al.*	Cross-Petition.	

This is to certify that when this cause was about to be heard, to-wit: on the 16th day of March, A. D. 1897, said Gertrude H. Hardin filed her motion in writing, having reference to the offering of further testimony, which motion was as follows:

Now comes the said Gertrude H. Hardin, by her counsel, and suggests to the Court here, that before the entry of any further or other decree herein, it is desirable and necessary that further evidence be taken, and she wishes to present further evidence upon the question left open for consideration by the decision of the Supreme Court.

She is prepared to show that since the entry of the original decree from which appeal was taken by some parties to the Supreme Court, another trial has been had of the ejectment suit of Gertrude H. Hardin *vs.* Conrad N. Jordan, in the Circuit Court of the United States for the Northern District of Illinois, referred to in the pleadings herein, and that by the consideration and judgment of said Court, at a term thereof recently held, to-wit: on the 10th day of December, A. D. 1896, it was found by said Court that your petitioner was seized in fee simple of certain lands claimed by her in said cross-petition, and that she was entitled to recover said lands to the center of Wolf Lake, the north line of the southeast fractional quarter of section nineteen (19), and the south line of the northeast fractional quarter of section thirty (30), being extended to the center of said lake, excepting from the points thus inclosed as a part of said tracts the fractional southwest quarter of fractional section twenty (20) and the southeast fractional quarter of section twenty (20), township thirty-seven (37) north, range fifteen (15) east, excepting also an extension of said last two mentioned tracts, respectively, westward to the center of the bay or part of said lake immediately west of said tracts respectively, such extension of the

second of said tracts having for its south boundary a line drawn westward from a point on the state line between the states of Indiana and Illinois, twenty-two (22) chains and sixty-nine (69) links south of the east and west center line of said section twenty (20), according to the plat of the survey of said lands (under the survey of 1834–5), returned to the General Land Office by the Surveyor General; and her said recovery included the east fraction of the southeast fractional quarter of section thirty (30) of said township and range, as extending to the middle of the bay or projection of the lake in front thereof.

And she expects to show by testimony that the said judgment is binding upon the said Charles B. Shedd, save only so far as there may be a question of boundaries. She expects to show that said Shedd has since the decision of the Supreme Court herein taken possession of part of the lands recovered by her by that aforesaid judgment in the Circuit Court of the United States.

She further suggests that in determining the rights of the parties to accretions or relictions, further testimony will be necessary with reference to artificial conditions for which said Shedd is responsible, and which tend to her injury upon the question, what is the extent of the land submerged; and she expects to show by such testimony that her tracts on the west shore of the lake, represented in said plats are under said decision of the Supreme Court to be bounded by the remaining part of the lake represented on said plat; there having been such recession of the waters from the west shore that her lands extend to the somewhat permanent waters near the line between the states of Indiana and Illinois.

The testimony taken at the hearing heretofore had, and prior to the entry of the decree from which appeal was taken by some parties to the Supreme Court of Illinois, not having been directed especially to the question of extent of accretions or relictions, but having more especially pertained to the question raised by persons claiming under the survey of 1874, whether there were omitted lands, or lands which should be considered as having belonged to the United States after the issuing of patents under the survey of 1834–5, from mistake of the surveyor, or for some such reason.

It is further suggested that injustice would be done said Gertrude H. Hardin if the conditions of the property at the time of the rendering of the former decree herein, or at the time of the filing of the petitions of said Shedd herein, were alone to be considered upon the evidence taken before the rendering of said decree; and she asks that justice may be done by allowing the introduction of evidence pertinent to the question left open for consideration by the Supreme Court.

She therefore moves that further evidence be allowed and taken into consideration.

(Endorsed) Filed March 16, 1897. John A. Cooke, Clerk.

Afterwards, to wit: On the 19th day of April, A. D. 1897, said Gertrude H. Hardin made a further offer, as follows:

"We offer the transcript of the final judgment in the United States Circuit Court for the Northern District of Illinois, in Hardin *v.* Jordan."

The transcript in Hardin *v.* Jordan, U. S. Circuit Court, which was proposed to be offered in evidence by Gertrude H. Hardin, was and is as follows:

Judgment in Hardin vs. Jordan.

United States Circuit Court, Northern District of Illinois.

Thursday, December 10, 1896.

Before Hon. William H. Seaman, District Judge.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN } Transcript of Judgment.

In Ejectment. Consolidated Cases, including General Docket Numbers 18197, 18198, 18199, 18200.

This cause having again come on for trial, and having been submitted to the Court (the parties, by their respective counsel, by writing filed, having waived a jury), and the court being now fully advised in the premises, it is found by the court that the plaintiff is entitled to recover possession of the premises described in the declaration, and is seized thereof in fee simple, and that the original defendants herein were at the time of the commencement of this suit in possession of parts of said premises, and that they, or said defendant Jordan, or some of them, claimed title to or an interest in certain parts of said premises which were represented or embraced in a certain survey made by order of the Commissioner of the General Land Office in the year 1874, which survey is by this Court, in accordance with the Opinion and decision of the Supreme Court of the United States herein, held to have been unauthorized, and which parts so claimed by said original defendants, or said Jordan, were under such alleged survey described as follows:

Lots two (2) and three (3) in the southeast quarter of section nineteen (19); lot two (2) in the southwest quarter of section twenty (20); the southeast quarter of the southwest quarter of section twenty (20); the west half of the southwest quarter of section twenty (20); lot one (1) in the southeast quarter of section twenty (20); lots one (1) and two (2) in the northeast quarter of section twenty-nine (29); the northwest quarter of section twenty-nine (29); the north half of the southwest quarter of section twenty-nine (29); the east half of the northeast quarter of section thirty (30); lot one (1) in the northeast quarter of section thirty (30); the northeast quarter of the southeast quarter of section thirty (30); lot three (3) in the southeast quarter of section thirty (30); all in township thirty-seven (37) north, range fifteen (15) east of the third principal meridian.

And the court further finds that the southeast fractional quarter

of section nineteen (19), and the northeast fractional quarter of section thirty (30), and the east fraction of the southeast fractional quarter of section thirty (30), in the township and range aforesaid, according to the official plat of the survey of said lands returned to the general land office by the surveyor general, were bounded by or situated on a lake which was and is non-navigable, the principal part of which is now known as Wolf Lake, and that the said plaintiff, as owner in fee of said several tracts, had and has the rights of a riparian proprietor in respect to said lake as represented on said plat, and that the seisin of the said plaintiff as to the two first named tracts last aforesaid extends to the center of Wolf Lake, the north and south lines of said tracts, respectively, being extended or carried to such center, excepting from the bounds thus inclosed the fractional southwest quarter of fractional section twenty (20) and also the southeast fractional quarter of said section twenty (20), in said township and range, according to said official plat, and excepting also an extension of said last two mentioned tracts, respectively, westward to the center of the bay or part of said lake immediately west of each of said tracts respectively, such extension of the second of said tracts having for its south boundary a line drawn westward from a point on the State line between the States of Indiana and Illinois, twenty-two (22) chains and sixty-nine (69) links south of the east and west center line of said section twenty (20), according to said plat, and that the east fraction of the southeast fractional quarter of said section thirty (30) extends to the middle of the bay or projection of the lake in front thereof.

And thereupon it is considered and adjudged that the plaintiff have a writ of possession for the said tracts of land of which she is so seized as so extending into and to the center of said lake and bays respectively, except as aforesaid, and thereby take, as to said several tracts so owned by her, the full rights of a riparian owner.

But, in accordance with a provision of said stipulation, no costs are adjudged or to be taxed herein against the said defendant.

NORTHERN DISTRICT OF ILLINOIS, } ss.
Northern Division. }

I, S. W. Burnham, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the order entered of record in said Court on the 10th day of December, A. D. 1896, in the cause wherein Gertrude H. Hardin is the plaintiff, and Conrad N. Jordan is the defendant, as the same appears from the original record thereof now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at my office in Chicago, in said district, this 9th day of March, A. D. 1897.

[SEAL] S. W. BURNHAM, *Clerk.*

The claim on the part of said Gertrude H. Hardin was that the said judgment determined the extent of the tracts embraced in it, save that as said Charles B. Shedd was not a party to it; the question of boundaries as between his tract and those described in the judgment would, as to him, be open for consideration. The claim that he was bound by the said judgment in any other respect rested in this only; that, since the recovery of said judgment, leases had been made by him to persons in occupancy of parts of the premises embraced in said judgment against whom it is claimed a writ of possession under said judgment was subject to be executed, and also that he has since the judgment taken possession of some parts of the said premises.

"We also produce witnesses to show:

The extent of the accretions connected with and properly a part of the tracts, respectively, of Gertrude H. Hardin and the Cook County Canal and Dock Company.

The nature and extent of the recession of the waters of the lake.

Additional surveys and representations thereof by field notes and plats, show that but a small part of the lake, to-wit: a part near the line between Illinois and Indiana and a part east of said line, remains a lake; the residue being accretions.

That such part, so far as it is in Illinois, has but little depth or likelihood of permanence, unless artificially sustained or protected, and has for some years been kept at an artificial elevation by petitioner Shedd, in order that ice may be taken therefrom at seasons for gathering ice, and that but for such artificial elevation the accretions properly a part of the tracts belonging to Gertrude H. Hardin would be increased in area.

The extent of such increase will be shown approximately by the testimony now ready to be offered and produced on the part of Gertrude H. Hardin.

The condition generally of the lake, or what was formerly a lake, and the permanence of the recession of the waters of the lake."

But the court declined to receive such evidence or allow witnesses to be examined as proposed by said Gertrude H. Hardin, and decided to take the case upon the evidence which was heard and considered by the court in the rendering of the decree herein of August 10, 1892, which said evidence was embodied in the Certificate of Evidence, a copy of which was embraced in the Transcript upon the Appeal heretofore heard in and by the Supreme Court of this state.

The said Gertrude H. Hardin, by her counsel, excepted in due time to the aforesaid rulings.

The Court admitted no new evidence at the present hearing, but considered only the evidence on which the former decree, to-wit: the said decree of August 10, 1892, was based, such evidence appearing from said former certificate of evidence.

The foregoing matters not fully appearing of record, certificate of evidence is, therefore, signed and sealed.

M. F. TULEY, [L. S.]
Judge Circuit Court, Cook County, Illinois.

O. K. WM. PRESCOTT.
H. S. MECARTNEY,
For Shedd.

(Endorsed) Filed August 25, 1897. John A. Cooke, Clerk.

And be it Remembered, that on the 11th day of August, A. D. 1897, there was entered in said cause by said Circuit Court of Cook County, a certain DECREE, as follows, to wit:

Draft of Decree.

Circuit Court of Cook County.

CHAS. B. SHEDD *vs.* ELIZABETH P. THOMAS ET AL.	442–443 B. R. Consolidated.
CHAS. B. SHEDD *vs.* J. ENSIGN FULLER ET AL.	

CHARLES B. SHEDD, *Petitioner*, *vs.* ELIZABETH P. THOMAS, CONRAD N. JORDAN, FRANK I. BENNETT, JAMES W. CONVERSE, ANDREW CRAWFORD, CHARLES H. WISNER, GERTRUDE H HARDIN, THE SOUTH CHICAGO AND SOUTHERN RAILROAD COMPANY, WILLIAM BUSH, JAMES W. SMITH, JOHN E. CURTIS, SAMUEL DAVIS, THOMAS WILKERSON, SOLOMON FIELD, THE UNKNOWN HEIRS AND DEVISEES OF CHARLES D. GILMORE, DECEASED, AND ALL WHOM IT MAY CONCERN, *Defendants.* — B. R. 442.

CHARLES B. SHEDD, *Petitioner*,
vs.
J. ENSIGN FULLER, CONRAD N. JORDAN, HENRY M. ALEXANDER, ASHBELL GREEN, GERTRUDE H. HARDIN, FRANK I. BENNETT, WILLIAM K. REED, TREAT CAMPBELL, JOHN I. BENNETT, THE SOUTH CHICAGO AND SOUTHERN RAILROAD COMPANY, THE COOK COUNTY CANAL AND DOCK COMPANY, JABEZ G. SMALE AND ALL WHOM IT MAY CONCERN, *Defendants.*
} B. R. 443.

1. The above entitled cases by former orders of this court having been consolidated, and now on this day again coming on to be heard as one case upon the motion of the petitioner (by his counsel) Charles B. Shedd, for an order and decree in conformity with the opinion of the Supreme Court of the State of Illinois, rendered at the January, A. D. 1896, term thereof, and a copy of the said opinion, together with transcripts of the final orders of the said Supreme Court, remanding the same, having been duly filed in this court, and it appearing to the court that more than ten days' notice of a motion by the petitioner, Charles B. Shedd, to reinstate and redocket said cases in this court, was given to all the defendants, and adverse parties hereto, and that said cases thereupon by an order of this court heretofore, on the 23d day of June, A. D. 1896, duly made and entered, have been reinstated and redocketed in this court.

2. And the said transcripts of the orders of the said Supreme Court, together with the said opinion, having been duly inspected and considered by this court, and the court having heretofore heard the cases as one case upon the several petitions, amended petitions, cross-petitions, amended cross-petitions herein, the several answers thereto, the replications to such answers, and the proofs—oral, documentary and written—taken and heard originally in said case, and having been argued by counsel for the respective parties, and the court having duly considered the same, and being now fully advised in the premises, does in pursuance of and conformity with the said order or mandate and opinion, of said Supreme Court, find, order, adjudge and decree as follows:

3. That on the 1st day of October, 1855, the United States of America, by its patent in due form bearing date of that day, granted and conveyed to Stephen A. Douglas, the fractional section twenty-nine (29) in township thirty-seven (37) north, of range fifteen (15), east of the third principal meridian, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General of the United States.

4. That all the right, title and interest in and to said lands and premises and appurtenances so acquired by said Douglas, through said patent, has, by various mesne conveyances, passed to and been acquired by the said petitioner, Charles B. Shedd, and is, and at the time of the commencement of this suit was, vested in him, said petitioner, Charles B. Shedd.

5. That the public records of Cook County, State of Illinois, were destroyed by fire on or about the 9th day of October, A. D. 1871, including the records of certain of the instruments of conveyance through and by which the said petitioner, Charles B. Shedd, deraigns title to said premises from said Douglas.

6. That on the first day of March, A. D. 1850, the United States of America, by its patent in due form, bearing date of that day, granted and conveyed to Horatio B. DeWitt the southwest fractional quarter of fractional section twenty (20), in township thirty-seven (37) north, of range fifteen (15) east of the third (3d) principal meridian, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General of the United States.

7. That all the right, title and interest in and to said last described lands and premises and appurtenances acquired by said DeWitt, through said patent, has, by various mesne conveyances, passed to and been acquired by the said petitioner, Charles B. Shedd, and is, and at the time of the commencement of this suit was, vested in him, said petitioner, Charles B. Shedd.

8. That the records of certain of the instruments of conveyance, through and by which the said petitioner Charles B. Shedd deraigns title to the premises last above described from said DeWitt, were destroyed by the fire aforesaid.

9. That on the 20th day of May, A. D. 1841, the United States of America, by its patent in due form, bearing date of that day, granted and conveyed to John Holbrook the lands described as follows, to-wit:

10. The southeast fractional quarter and the east fraction of the southwest fractional quarter of section nineteen (19), and the northeast fractional quarter and the east fraction of the southeast fractional quarter of section thirty (30), all in township thirty-seven (37) north, of range fifteen (15) east of the third (3rd) principal meridian, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General of the United States.

11. That all the right, title and interest in and to said lands and premises and appurtenances so acquired by said John Holbrook, through said patent, has by various mesne conveyances passed to and been acquired by the said cross-petitioner Gertrude H. Hardin, and is and at the time of the commencement of this suit was (except as hereinafter found and determined) vested in her, said cross-petitioner, Gertrude H. Hardin.

12. That on the 1st day of August, A. D. 1853, the United

States of America, by its patent in due form, bearing date of that day, granted and conveyed to William B. Egan the west fraction of the southeast quarter (west of lake) of section thirty (30), township thirty-seven (37) north, of range fifteen (15) east of the third (3rd) principal meridian, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General of the United States.

13. That all the right, title and interest in and to so much of said last described tract as lies east of the west eighty (80) rods thereof has by certain mesne conveyances passed to and been acquired by the said cross-petitioner, Gertrude H. Hardin, and is vested in her, as is claimed in her answer and cross-petition.

14. That all of said lands are situate in the County of Cook and State of Illinois.

15. That the survey of said lands, with reference to which said official plat was constructed, was made by authority of the United States and its officers in the years A. D. 1834 and 1835, and that according to said official plat of said survey and as a matter of fact, each, all and every of the above described tracts of land so patented by the United States respectively, except the said east fraction of southwest quarter of section nineteen (19) aforesaid, border and abut upon a certain lake or lakes designated on said official plat "Navigable Lake," but which was and is in fact a non-navigable lake or lakes.

16. That in and by said survey the said lake or lakes was in the usual manner meandered for the purpose of ascertaining the quantity of upland of the surrounding tracts to be charged for, to the respective purchasers, and not for the purpose of limiting the respective grants and conveyances to such purchasers to the meander lines (so called) of said survey—the waters of the lake constituting and being the boundaries of such grants.

17. That by reason of the situation and location, and the abutting of the said tracts and parcels of land so owned by the petitioner, Charles B. Shedd, and the said Gertrude H. Hardin and the said Cook County Canal and Dock Company, respectively, aforesaid, except the said east fraction of the southwest quarter of fractional section nineteen (19) aforesaid, upon said lake or lakes aforesaid, they, the said Charles B. Shedd and Gertrude H. Hardin and Cook County Canal and Dock Company, are riparian proprietors with reference to the waters and bed of said lake or lakes, and are each and respectively entitled to claim and have all and singular the rights, privileges and interests incident and belonging thereto as such riparian proprietors.

18. That such riparian proprietorship and rights are property rights of great value.

19. That, at the time of the survey of 1834 and 1835, and at the time the said tracts or parcels of land were respectively sold and patented by the United States as aforesaid, the submerged land of said lake or lakes, together with the waters thereof, to the ex-

tent the same lay within the State of Illinois, was held and controlled by the State of Illinois, who alike had the benefit thereof in fishing, boating and the like; and so long as such meandered lakes exist the state exercises such control and holds the same so in trust. But the riparian owners were and are entitled to all the rights incident to riparian proprietorship, including the right to accretions and relictions, and to follow the recession of waters to their edge.

20 That in the year A. D. 1874 the Commissioner of the General Land Office of the United States, acting as *ex officio* Surveyor General of the United States, ordered and caused to be made a survey of the bed of said lake or lakes, including some portions of the lands so patented by the United States to the said Douglas, DeWitt, Egan and Holbrook respectively, the title to which, as heretofore found by the court, was and is vested in the petitioner, Shedd, and the cross petitioner, Hardin, and the said Cook County Canal and Dock Company.

21. That said last mentioned survey was ordered and made upon the theory of the correctness of the survey of 1834 and 1835, and upon the false theory and erroneous supposition that the meander line—so called—of said survey of 1834 and 1835 was a line of boundary limiting the grants of purchasers thereunder to the said so-called meander line, and that parts of the lake by the recession of the waters had become dry land and fit for cultivation; that the title to the same was vested in the United States and that the United States possessed the right and power to sell and convey the same.

22. The court further finds that subsequent to the said survey of 1874, and based thereon, the officers of the United States permitted and pretended to authorize the entry and purchase and conveyance by patent of the United States to divers persons, hereinafter named, of all the lands submerged as well as that unsubmerged, embraced by the said last mentioned survey.

23. That defendant, Andrew Farrand, obtained a pretended grant by patent based upon said survey, bearing date July 2, A. D. 1881, of certain parcels of the said land described in and by said survey of 1874, as follows, to-wit: Lot one (1) of the northeast quarter, and lots two (2) and three (3) of the southeast quarter of section nineteen (19) and lot three (3) of the northwest quarter of section (20), township thirty-seven (37) north, range fifteen (15) east of the third (3rd) principal meridian.

24. That the title and ownership of said parcels of land is claimed in this proceeding through mesne conveyances by the defendants Conrad N. Jordon and John I. Bennett, and is in conflict with the claims and rights and ownersnip of cross-petitioner Gertrude H. Hardin.

25. That the defendant Alice Coudit obtained a pretended grant by patent from the United States based upon said survey of 1874, bearing date of July 2, A. D. 1881, of certain parcels of said land described under the said survey of 1874 as follows, to wit: The west

half of the southwest quarter, the south half of the east half of the southwest quarter and lot two (2) of the southwest quarter of fractional section twenty (20) of the township and range aforesaid.

26. That the title and ownership of said parcels of land is claimed in this proceeding through mesne conveyances by the defendents Conrad N. Jordan and John I. Bennett and the South Chicago and Southern Railroad Company, and is in conflict with the claims and rights and ownership of petitioner Charles B. Shedd and cross-petitioner Gertrude H. Hardin.

27. That the defendant Thomas C. Wilkerson obtained a pretended grant by patent from the United States, bearing date March 4, A. D. 1882, of a certain parcel of said land described in and by the survey of 1874, as follows, to wit: The northwest quarter of the northwest quarter of fractional section twenty-nine (29) of said township and range.

28. That the title and ownership of said parcel of land is claimed in this proceeding through mesne conveyances by the defendants, Aaron B. Mead and Albert L. Coe and A. C. Higgins and the South Chicago and Southern Railroad Company, and is in conflict with the claims and rights and ownership of petitioner Charles B. Shedd.

29. That the defendant John White obtained a pretended grant by patent from the United States bearing date March 4, A. D. 1882, of a certain parcel of said land described in and by the survey of 1874, as follows, to wit: The northeast quarter of the northwest quarter of fractional section twenty-nine (29) of the township and range aforesaid.

30. That the title and ownership of said parcel of land is claimed in this proceeding through mesne conveyances by the said Aaron B. Mead and Albert L. Coe and A. C. Higgins and the South Chicago and Southern Railroad Company, and is in conflict with the claims and rights and ownership of petitioner Charles B. Shedd.

31. That the defendant Solomon Field obtained a pretended grant from the United States, bearing date July 2, A. D. 1881, of certain parcels of said land described in and by the survey of 1874, as follows, to wit: The south half of the northwest quarter and the north half of the southwest quarter of section twenty-nine (29) of the township and range aforesaid.

32. That the title and ownership of said parcels of land is claimed in this proceeding through mesne conveyances by the defendants Conrad N. Jordan, John I. Bennett and the South Chicago and Southern Railroad Company, and is in conflict with the claims and rights and ownership of petitioner Charles B. Shedd.

33. That the defendant John E. Curtis obtained a pretended grant by patent from the United States, bearing date March 4, A. D. 1882, of parcel of said land described in and by the survey of 1874, as follows, to wit: The fractional southwest quarter of the

southwest quarter or lot five (5) of fractional section twenty-nine (29) in the township and range aforesaid.

34. That the defendant James W. Smith obtained a pretended grant by patent from the United States, bearing date March 4, A. D. 1882, of parcel of said land described in and by the survey of 1874 as follows, to wit: The southeast quarter of the southwest quarter of fractional section twenty-nine (29) in the township and range aforesaid.

35. That the title and ownership of said last two mentioned parcels of land is claimed in this proceeding by the defendants Elizabeth P. Thomas and John I. Bennett, and are in conflict with the claims, rights and ownership of the petitioner Charles B. Shedd.

36. That the defendant Franklin A. Cleveland obtained a pretended grant by patent from the United States, bearing date July 2, A. D. 1881, of parcel of said lands described in and by the survey of 1874, as follows, to-wit: The northeast quarter of the southeast quarter and lot three (3) of the southeast quarter of section thirty (30) and lot one (1) of the northeast quarter of section thirty-one (31) in the township and range aforesaid.

37. That the title and ownership of said parcels of land is claimed in this proceeding through mesne conveyances by the defendants Cleveland Jordan, Frank I. Bennett and George W. Woodbury, The Superior Savings Loan and Building Association, and the South Chicago and Southern Railroad Company, and are in conflict with the claim and rights and ownership of cross-petitioner Gertrude H. Hardin.

38. That the defendant Chester B. Rushmore obtained a pretended grant by patent of the United States, bearing date July 2, A. D. 1881, of certain parcels of said lands described in and by the survey of 1874 as follows, to-wit: The east half of the northeast quarter and lot one (1) of the northeast quarter of fractional section thirty (30) in the township and range aforesaid.

39. That the title and ownership of said parcels of land is and has been claimed in this proceeding by the defendant Chester B. Rushmore, Charles E. Rand and Edward B. Holmes (whose heirs have entered their appearance in this cause, and are bound by the former proceedings and decree herein and by this decree) and Calumet River Railway Company, and is in conflict with the claims, rights and ownership of cross-petitioner Gertrude H. Hardin.

40. That said pretended grants, conveyances and patents so founded upon the said survey of 1874 and the respective mesne conveyances and deeds aforesaid, and each and all and every of them, are in conflict with the rights and claims and ownership of the petitioner Charles B. Shedd, the cross-petitioner Gertrude H. Hardin, and the Cook County Canal and Dock Company, respectively.

41. That by the survey of 1874 an attempt was made by the officers of the United States government to take possession of, survey and sell riparian rights and proprietorship in and to the waters and bed of said lake, also certain of the former bed of said lake or

lakes, which had become dry land, as well certain of the uplands, the title to which had previously passed by patents from the United States to divers purchasers thereof.

42. That no power or right existed in the Commissioner of the General Land Office or other officers of the United States government, to make or cause to be made such survey, sell or convey said lands or any part thereof so embraced by the survey of 1874; and that the said survey of 1874 and the pretended grants, patents and conveyances by the United States and its officers, and each and every of them, so founded upon said survey of 1874, so hereinbefore enumerated and set forth, were and are unauthorized, null and void.

43. Wherefore as against all persons parties to this proceeding claiming adversely to the petitioner Charles B. Shedd, the cross-petitioner Gertrude H. Hardin, the Cook County Canal and Dock Company, or either of them, the court holds and doth hereby order, adjudge and decree that all such adverse and conflicting claims and all the grants, patents and conveyances, hereinbefore enumerated, so founded upon the survey of 1874, and each, all and every the acts of the officers of the United States resulting in the issuance of such patents—together with each, all and every the respective mesne conveyances thereunder, were and are invalid, illegal and void.

44. And the court doth further find as matter of fact that John Forsyth did not purchase the tract of land containing 7.37 acres within the meander lines of the said fractional section twenty-nine (29), nor any part or portion of said fractional section twenty-nine (29), for and on behalf of Charles Reese, as alleged and set forth in the answer of the Illinois Land and Loan Company.

45. And that the deed of said Charles E. Reese and wife to F. I. Bennett, dated September 5, 1881, purporting and pretending to convey fractional southwest quarter of southeast quarter of said section twenty-nine (29), passed no title to the lands therein described, and was and is, as against the rights of petitioner Charles B. Shedd, void.

46. And the court doth further find as a matter of fact that there was not possession adverse to petitioner Shedd as to said fractional section twenty-nine (29), or any part or portion thereof, as alleged and claimed by the defendants herein, nor are defendants or any of them entitled to the benefits of any of the limitation laws in respect to said tract of land.

47. And the court doth further find as matter of fact that there was not possession adverse to petitioner Charles B. Shedd, or cross-petitioner Gertrude H. Hardin, and Cook County Canal and Dock Company, or either of them, by actual residence for seven years prior to the beginning of the suits (now consolidated) on the property or any part or portion thereof claimed by (and now hereby awarded to them by the court), the said Shedd, Hardin and Cook County Canal and Dock Company, respectively, and as declared in

said former decree, that the several defenses set up and asserted by the various defendants under the limitation laws of Illinois against the said petitioner, Charles B. Shedd, Gertrude H. Hardin and the Cook County Canal and Dock Company, respectively, are not valid, are not sustained nor are the same good in law; said decree of August 10, 1892, to stand and remain in full force as to J. Ensign Fuller, Conrad N. Jordan, Frank I. Bennett, Franklin A. Cleveland, Elizabeth P. Thomas, Charles E. Rand, severally and respectively, the same having been affirmed as to them by the Supreme Court. The heirs at law of John I. Bennett, deceased, having entered their appearance herein, are made parties to this decree and shall be fully bound by the same.

48. And the court doth further find that the sale of November 9, 1876, of fractional southwest quarter of said section twenty (20) for an installment of a South Park assessment and the deed made thereon to the South Park commissioners, dated August 1, 1879, are irregular, illegal and void, and that each and all conveyances founded thereon were and are void.

49. And that the sale of December 3, 1874, of ten (10) acres in said fractional section twenty-nine (29) for an installment of a South Park assessment and the deed thereon to Reuel W. Bridge of August 1, 1887, are likewise irregular, illegal and void, and that each and all conveyances founded thereon were and are void.

50. That the sale of September 30, 1880, of said fractional section twenty-nine (29) for an installment of a South Park assessment, and the deed thereon to D. J. Hubbard, dated November 8, 1883, are likewise irregular, illegal and void, and that each and all conveyances founded thereon were and are void.

51. And that the sale of October 4, 1880, of said fractional section twenty-nine (29) for the taxes of 1879, and the deed thereon to James W. Converse of July 2, 1884, are likewise irregular, illegal and void; and that the sale of September 12, 1881, of said fractional section twenty-nine (29) and the deed thereon to James W. Converse of July 2, 1884, are likewise irregular, illegal and void.

52. And that the sale of September, 1884, of the north half of the northwest quarter of said section 29 for the taxes of 1883, and the deed thereon to James W. Converse of October 30, 1886, are likewise irregular, illegal and void.

53. And that as to the sale of September 25, 1884, to William K. Reed of the east half of said fractional section 29 for the taxes of 1883, and the sale of September 22, 1885, to William K. Reed of lots 1, 2, 3 and 4 of the said east half of said fractional section 29 for the taxes of 1884, by consent of said Reed and Converse and Illinois Land and Loan Company, this suit is dismissed without costs and without prejudice.

55. That the several supposed tax titles set up or asserted as claims in opposition to the cross-petitions of said Gertrude H. Hardin, namely, the supposed tax titles or claims set out in the answer of Fred F. Bennett and John I. Bennett, under the deeds

issued to the South Park commissioners, dated August 1, 1879, and March 8, 1882, as upon a sale made November 9, 1876, of fractional northeast quarter of section 30, or some supposed part thereof, and the four supposed tax deeds referred to in the answer of J. Ensign Fuller, namely, a deed to David G. Hamilton, of date September 6, 1875, a deed to said Hamilton of date March 5, 1877, a deed to Polemus D. Hamilton of May 31, 1877, and a deed to Hamilton, of date, July 23, 1880, and the alleged tax sale of September 19 or 20, 1883, whichever sale was for taxes not since paid, to William K. Reed, are each and all invalid and void, and are subject to be removed as clouds as hereinafter provided.

56. That as to said tax sale of September 19, 1883, to William K. Reed, and as to the several tax deeds or claims under said supposed tax deeds to the South Park Commissioners of date August 1, 1879, and March 8, 1882, and the said several deeds to David G. Hamilton and Polemus I. [D.] Hamilton, respectively, under date of September 6, 1878, March 5, 1877, May 31, 1877, and July 23, 1880, the court finds the same to be irregular, illegal and void.

57. And the court doth further find that all of said tax sales and deeds, as aforesaid, are clouds upon the title of the petitioner Charles B. Shedd and the cross-petitioner Gertrude H. Hardin, and the Cook County Canal and Dock Company, to the property by them claimed herein, and as such ought to be annulled, vacated and set aside. But, upon condition that the parties in interest, and to whom the premises covered by said tax sales have been awarded, hereinafter, respectively, pay to the respective holders of the tax titles (except where said holders have been in possession of the premises at the dates when the taxes (paid by sale or otherwise) became liens), the moneys paid at such tax sales, respectively, and all subsequent taxes paid thereunder, respectively, on the said lands, or the portions thereof which were, at the date of the said respective sales and payments unsubmerged by the waters of said Wolf and Hyde lakes, and also all taxes paid by the holders of the tax certificates set up in the answers, respectively; also all subsequent taxes paid thereunder; also six per cent (6%) per annum interest, respectively, upon said sales and tax certificates, and subsequent payments, respectively, from the date of the same, respectively; together with the costs in this suit of the said tax claimants. Where any tax sale and payments thereunder cover a tract, the whole of which has not been awarded to one of the said parties in interest, then each party shall pay the proportion of said sales and payments and interest thereon, which the portion awarded to them bears to the whole tract purported to be covered by said tax sales and payments.

59. That upon the payment aforesaid all of the said tax sales and all the deeds based thereon, or growing out of the same, shall be and the same are hereby vacated, set aside and annulled as clouds upon the title of said petitioner Shedd and cross-petitioner Gertrude H. Hardin and the Cook County Canal and Dock Company, and the same are hereby adjudged and decreed by the court to

be of no force, virtue or effect whatever. As to the said sales of September 30, 1880, October 4, 1880, and September 12, 1881, the amounts of said sales, and all taxes as paid thereunder, and interest thereon as provided in this decree, the court further finds from the evidence produced by said Converse, W. K. Reed and said Illinois Land and Loan Company and said Shedd, and also by stipulation of said parties, to be the aggregate sum of one thousand dollars, which, with the costs of said parties, and with the consent of said parties, it is hereby ordered (is) to be paid to W. R. Plum, counsel of record herein for said Converse, Reed and said company, or to said Converse or to said company, or in case of their failure or refusal, or the failure or refusal of either of them to receive said amount, that then said Shedd deposit the same with the clerk of this court for the use of said Converse and said company within thirty days from the entry of this decree, and thereupon the relief granted said Shedd is declared to be consummate and absolute; and in case of the failure of said Shedd, or his grantees or assigns, to so pay or deposit said sum, that then no relief as to said tax sales and tax deeds shall be given, and the same be considered as not given herein, and said tax sales and tax deeds shall remain unaffected by this suit and by this decree.

And the court further finds that by reason of some of said sales, and the payments thereunder, covering tracts wholly submerged, and by reason of same being made while the parties claiming thereunder claimed to be in actual possession of the land when the taxes (paid by sale and otherwise) have become liens, and by reason of various offsets with the above provision for payment to said Converse and Illinois Land and Loan Company, all the said tax sales and tax payments, thereunder, as above specified, are fully discharged, and the said tax sales and tax deeds are hereby cancelled absolutely, with the exception of those as to which the suit is dismissed above without prejudice.

That as to the provision in the former decree referring this cause to the master to state an account as to taxes and tax deeds, the parties hereto have not prosecuted said reference nor taken steps thereunder, and that this decree disposes of all tax claims upon said premises set up in this proceeding or held by any of the parties hereto, except as to the tax sale of September 19, 1883, referred to in the former decree as being of September 19 or 20, 1883, and relating to 80.89 acres in southeast quarter of said section nineteen (19), the said Gertrude H. Hardin electing not to proceed under the former order of reference to have the amount to be paid for taxes, costs and interest ascertained, it is ordered by the court, on motion of cross-petitioner Gertrude H. Hardin, that her cross-petition be dismissed as to said tax sale, which, therefore, is not intended to be affected by this decree this day entered.

60 The court further finds that said lake, as shown by the said official plat of the survey of 1834 and 1835, and, as a matter of fact, extends easterly beyond the state line between Indiana and

Illinois and into the former state, that it was as shown by the said plat, and that the center would lie just east of the state line, which latter line is a little less than one mile east of the north and south section line between sections thirty (30) and nineteen (19) and sections twenty-nine (29) and twenty (20).

61. That at the time of the said survey in 1834 and 1835, the point of land shown on the said official plat as the southwest fractional quarter of fractional section twenty (20) aforesaid extended in a southwesterly direction to the south line of said section and beyond said line. That the ridge or point of land forming the northerly portion of said fractional section twenty-nine (29) extended north or northeasterly to the north line of the southwest quarter of said section 29.

62. That the east fraction of the southeast quarter of fractional section thirty (30) formed a part of this ridge, and extended north to the north line of the southwest quarter of section twenty-nine (29), if extended.

63. That north of the north line of the south half of said section twenty-nine (29), up to the south line of said section twenty (20), the land was, at the time of the government survey in 1834 and 1835, covered by the water of the lake, so that at that time there was here but one lake extending, as shown by the official plat, from the west line of Wolf Lake to the state line.

64. That from the northeast corner of the southwest quarter of said fractional section twenty (20) there extended in a southerly direction a ridge. From the southeast corner of fractional southeast quarter of section thirty (30) and the southwest corner of fractional section twenty-nine (29) a ridge extending in a northerly direction.

65. The extent to which this ridge projected from the north was about 220 rods, and the extent of the projection from the south was about 160 rods.

66. The width of these ridges varied, some places being twenty-eight (28) rods wide and others wider, which was dry land at ordinary stages of water, still others narrower, and this was the case at the time of the original survey. Along these ridges in their projections from the north and south, trees of different varieties grew, some of which were three feet in circumference. These points at their extremities were about eighty (80) or ninety (90) rods apart, and between these points and along the sides of the ridge and around the margin of the lake within its meandered line reeds and coarse grass grew in the water.

67. In the marshy depressions between these points were two islands, one a mere knoll, the other containing about one (1) or two (2) acres and on which trees and bushes grew, which islands passed under said patent of fractional section 29 to the grantee therein and have vested in petitioner Shedd.

68. This was substantially the physical condition in ordinary stages of water at the time of the survey in 1834 and 1835, and the

changes in the physical conditions thereof from that time to the year 1874 were not great—such as existed resulting from the slow filling of the lake bed and from other natural causes.

69. Since the year 1874, by reason of the improvement of the Calumet River and the wearing out of deeper natural channels from the lake, and an increased flow therefrom, and the same natural causes continuing to raise the bed of the lake, there has been a recession of the waters, causing dry land on both sides of the ridge; and around the borders of the lake the recession was such that between the meandered lines and the water there was uncovered (and the greater part of the year was dry land around the lake) a strip twenty (20) to twenty-five (25) rods wide, and the marshy depression between the two ridges of land above described has become permanent dry land, the width thereof at the date of the former decree varying from at least thirty-six rods to seventy rods; that said permanent land thus accruing became attached to the said ridges of land as accretions and by reason of such recession of the waters.

70. It is therefore further ordered, adjudged and decreed by the court that the petitioner Charles B. Shedd do have and recover of and from each, all and every person and persons in possession of or claiming any right, title or interest in or to the same, or to any part thereof, the possession of the said fractional southwest quarter of fractional section twenty (20) and the said fractional section twenty-nine (29), all in township thirty-seven (37) north of range fifteen (15) east of the third principal meridian, and the lands particularly described as follows, to-wit:

71. Beginning at the northeast corner of said fractional southwest quarter of said fractional section twenty (20), township thirty-seven (37) north, range fifteen (15) east of the third principal meridian, running thence south along the east line of said southwest fractional quarter of said fractional section twenty (20) (and the extension thereof to the south) to the open waters of Wolf Lake; thence along with the open waters of Wolf Lake in a southerly or southwesterly direction to the south line (extended to the east) of the said fractional section twenty-nine (29); thence west along said line as extended, and said south line of said section twenty-nine (29) to the north and south section line between sections twenty-nine (29) and thirty (30) of said township and range; thence north along the line between said sections twenty-nine (29) and thirty (30) and its extension to the north to a point identical with the northwest corner of the southwest quarter of said section twenty-nine (29), if said section were fully squared out and all its lines extended; thence from said point northwesterly to the waters of Hyde Lake, along a line drawn at an angle of forty degrees with a line drawn due east and west through or at said point; thence along with the waters of Hyde Lake in a northerly or northeasterly direction to the center east and west line (extended to the

west) of section twenty (20); thence east along said line as extended and along said line to the place of beginning.

72. Together with all and singular the riparian rights and privileges and benefits incident to the position and location of said described tract or tracts of land with reference to the lakes as aforesaid, and the title of the petitioner Charles B. Shedd to said described tract, tracts and parcels of land is hereby established and declared and confirmed, and he is hereby adjudged and decreed by the court to be seized thereof as of an indefeasible estate of inheritance in fee simple as well against all the parties hereto, and all persons claiming or to claim under them, or either or any of them, as against all the world. And it is further ordered, adjudged and decreed by the court that all the defendants to the petitions and amended petitions of the said Charles B. Shedd, and all parties in possession of said lands or any part thereof so awarded to him as aforesaid, do forthwith surrender possession thereof to him, said Charles B. Shedd.

73. And it is further ordered, adjudged and decreed by the court that the cross-petitioner, the said Gertrude H. Hardin, do have and recover of and from each, all and every person and persons in possession of or claiming any right, title or interest in or to the same, or any part thereof, the possession of the said east fraction of the southwest fractional quarter of said fractional section nineteen (19), in township thirty-seven (37), north of range 15, east of the third (3rd) principal meridian, together with all and singular the riparian rights and privileges and benefits incident to the position and location of said described tract or parcel of land with reference to the Calumet River as aforesaid.

74 and 75. And it is further ordered, adjudged and decreed by the court that the said cross-petitioner, Gertrude H. Hardin, do have and recover of and from each, all and every person and persons in possession of or claiming any right, title or interest in or to the same or to any part thereof, the possession of the said southeast fractional quarter of section nineteen (19), township thirty-seven (37), north of range fifteen (15), east of the third principal meridian, and also the northeast fractional quarter and the east fraction of the southeast fractional quarter of section thirty (30), and that part of the west fraction of the southeast fractional quarter of section thirty (30) which lies east of a line running north and south at a distance of eighty (80) rods from the north and south center line of said section, all in the township and range aforesaid. The said tracts known as the southeast fractional quarter of section nineteen (19), and the northeast fractional quarter of section thirty (30), are hereby held to embrace and include all the land on the west side of the open waters of Hyde Lake south of a line extended due east from the center of section nineteen (19) to the open waters of said lake, and north of a line drawn due east from the center of said section thirty (30) to the open waters of said lake, said tracts extending to the open waters of said lake, excepting from the property

herein described a strip of land four hundred (400) feet wide in the southeast quarter of section nineteen (19) hereinafter awarded to the Cook County Canal and Dock Company.

And the said Gertrude H. Hardin, as owner of the tracts and lands so found to be held by her, shall have all and singular the riparian rights and privileges and benefits incident to the position and location of said several tracts or parcels of land with reference to said lake.

The tract known as the east fraction of the southeast fractional quarter of section thirty (30), with that part of the west fraction of the southeast quarter of section thirty (30) which lies east of a line drawn north and south at a distance of eighty (80) rods east from the north and south center line of said section thirty (30), is hereby held to embrace and include land bounded as follows:

Beginning at the southeast corner of said section thirty (30); thence running north to the northwest corner of the southwest quarter of section twenty-nine (29) aforesaid, if squared out; thence northwest at an angle of forty degrees along a line fixed herein (as a boundary for property of Charles B. Shedd as described herein) to the open waters of said Hyde Lake; thence along said open waters following the same towards or to the north line of the southeast quarter of said section thirty (30), if fully squared out, and extending along said waters or in a direct line from said open waters to said line (if such extension be necessary to complete boundaries), to the north line of the southeast quarter of section thirty (30) aforesaid, if fully squared out, and thence extending upon and along said line to a line running north and south at a distance of eighty (80) rods east from the north and south center line of said section thirty (30) to the south line of said section thirty (30) if extended; thence east on said line to the place of beginning; so as to embrace the land southwest of said line so run at an angle of 40 degrees, and all of said southeast quarter of said (said) section thirty (30) if squared out east of said line running north and south eighty rods east from the north and south center line of said section.

And the said Gertrude H. Hardin, as owner of the tracts and lands so found to be held by her, shall have all and singular the riparian rights and privileges and benefits incident to the position and location of said several tracts or parcels of land with reference to said lake.

76. And the title of the cross-petitioner, Gertrude H. Hardin, to the said tracts or parcels of land is hereby established and declared and confirmed, and she, the said cross-petitioner Hardin, is hereby adjudged and declared by the court to be seized thereof as of an indefeasible estate of inheritance in fee simple, as well as against all the parties hereto, and all persons claiming or to claim under them or either or any of them, as against all the world.

And it is further ordered, adjudged and decreed by the court that all the defendants to the cross-petitions and amended petitions of her, the said Gertrude H. Hardin, and all parties in possesion of

said lands, or any part thereof, so awarded to said Gertrude H. Hardin as aforesaid, do forthwith surrender and yield up possession thereof to her, the said Gertrude H. Hardin.

78. And it is further ordered, adjudged and decreed by the court that the cross-petitioner, the Cook County Canal and Dock Company, have and recover from each, all and every person and persons in possession of or claiming any right, title or interest in or to the same or any part thereof the possession of the tract or parcel of land described as follows, to wit: a strip of land four hundred feet wide to be taken off of the south side of the southeast quarter of said fractional section nineteen (19), running the whole length east and west of said quarter section, and extending eastward to the waters of Hyde Lake (excepting, however, the right of way of the Calumet River Railway Company), together with all the riparian rights, privileges and benefits incident to the position and location of said tract or parcel of land, with reference to the lake aforesaid, subject to the exception aforesaid.

79. And the title of the said Cook County Canal and Dock Company in and to said tract or parcel of land (subject to the exception aforesaid) is hereby established and declared, and it, said Canal and Dock Company, is hereby adjudged and decreed by the court to be seized thereof as of an indefeasible estate of inheritance in fee simple, as well against all the parties hereto, and all persons claiming or to claim under them, or either or any of them, as against all the world.

80. And it is further ordered and adjudged and decreed by the court that all the defendants to the cross-petitions and amended petitions of the said Cook County Canal and Dock Company, and all parties in possession of said lands or any part thereof so awarded to said Cook County Canal and Dock Company, as aforesaid, do forthwith surrender and yield up possession thereof to it, the said Canal and Dock Company.

81. It is further ordered, adjudged and decreed by the court that the awarding and decreeing herein of the several tracts and parcels of land to the said Gertrude H. Hardin and the said Cook County Canal and Dock Company, as aforesaid, is subject to the right and claim of the Calumet River Railway Company, under a conveyance to the South Chicago and Southern Railroad Company, recorded in book 2027, page 97, of records of said Cook County, to a strip of land of and for said company's right of way through said southeast quarter of said fractional section nineteen (19) and northeast quarter of fractional section thirty (30), granted by said Gertrude H. Hardin and Isaac N. Hardin, her husband, by said deed, which bears date December 24, 1886.

82. And it is further ordered, adjudged and decreed by the court that the several cross-petitions and amended cross-petitions of John I. Bennett, Andrew Crawford, Elizabeth P. Thomas, Conrad N. Jordan, J. Ensign Fuller, Franklin Cleveland, Frank I. Bennett, James W. Converse, Charles E. Rand, and all cross-petitions

and amended cross-petitions filed herein, except those of the cross-petitioner Gertrude H. Hardin, and the Cook County Canal and Dock Company, be and the same are hereby each and respectively dismissed for want of equity.'

83. It is further ordered, adjudged and decreed by the court that all persons parties hereto who were in possession of the premises or any part thereof so awarded to the said Charles B. Shedd, Gertrude H. Hardin, and the Cook County Canal and Dock Company, respectively, as aforesaid, at the time of the commencement of said suits, and any and all persons or parties who have come or may come into possession thereof of any part of the premises, respectively, so awarded to said Charles B. Shedd, Gertrude H. Hardin and the Cook County Canal and Dock Company, respectively, since the commencement of said suits, shall, upon being served with a copy of this decree, surrender possession to the said Charles B. Shedd, Gertrude H. Hardin and the Cook County Canal and Dock Company, respectively, as to the several tracts ar parcels of land so awarded to them, respectively, and, in default of such surrender, leave is hereby given to apply to the court for a writ of possession as against any person or persons so failing or refusing to surrender possession, as aforesaid.

84. In the case of the South Chicago and Southern Railroad Railroad Company, it is ordered, adjudged and decreed that, if said company do not deliver up possession of the respective portions of said premises occupied by it, falling within the boundaries of and included within the respective tracts above awarded to said Shedd and Hardin, within forty days from and after the date of this decree, or in case of an appeal from this decree by said company, then within forty days after demand shall have been made by said parties. respectively, by anyone duly authorized by them, respectively, for said possession at any time after this decree shall have become final; then the said parties, respectively, their heirs or assigns, may apply to this court for a writ or writs of possession against said railroad company, and said writ or writs shall thereupon issue unless said company shall show good cause to the contrary; and the right of said Hardin and Shedd to sue at law said railroad company for the damages. use and occupation since the time of the commencement of this suit, of the land so awarded them, respectively, and occupied by said railroad company, is hereby preserved and established by consent of said Shedd and Hardin, and said company in lieu of a reference to a master of this court or special commissioner or commissioners to be appointed for that purpose.

The court reserves the right to have executed, as to the premises occupied by said company, a writ of possession, unless the said company shall within the forty days aforesaid commence proceedings for condemnation of such premises respectively, and shall duly (duly) prosecute the same, and pay the damages and costs awarded therein. And from the foregoing decree the said Gertrude H. Hardin and the Cook County Canal and Dock Company pray an

appeal to the Supreme Court of Illinois, which is allowed upon filing an appeal bond in the penal sum of five hundred dollars ($500) within twenty (20) days, and certificate of evidence within thirty days (30) days, said bond to be with surety or sureties to be approved by the clerk of this court.

And now also comes James W. Converse, Illinois Land and Loan Company and William K. Reed, each for himself, and except to the said decree, and pray an appeal therefrom, wherefore it is ordered that said parties be allowed an appeal jointly or separately, or in part joint as they may elect, to the Supreme Court upon filing their bond or bonds in the penal sum of five hundred dollars and certificate of evidence within thirty days, the bond to be approved by the clerk of this court.

Enter.

M. F. TULEY,
Judge Circuit Court, Cook County, Illinois.

And thereafter, to-wit: on the 23d day of August, 1897, there was filed in said cause in said Circuit Court an Appeal Bond, as follows, to-wit:

Appeal Bond.

Know all Men by these Presents, That we, Gertrude H. Hardin, The Cook County Canal and Dock Company and Isaac N. Hardin, of the County of Cook and State of Illinois, are held and firmly bound unto Charles B. Shedd, also of the same county and state, in the penal sum of five hundred ($500) dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly, by these presents.

Witness our hands and seals, this 16th day of August, A. D. 1897.

The corporate seal of said company is hereto affixed.

The Condition of the above Obligation is such, That, whereas, the said Charles B. Shedd did, on the 11th day of August, A. D. 1897, in the Circuit Court of Cook County, in the state aforesaid, and of the July term thereof, A. D. 1897, recover a decree in a certain cause then pending in said court, the same being 442 and 443 B. R., a case consolidated, entitled Charles B. Shedd *vs.* Elizabeth P. Thomas *et al.*, and Charles B. Shedd *vs.* J. Ensign Fuller *et al.*; from which said decree of the said Circuit Court of Cook County the said Gertrude H. Hardin and Cook County Canal and Dock Company have prayed for and obtained an appeal to the Supreme Court of said state.

Now, therefore, if the said Gertrude H. Hardin and Cook County Canal and Dock Company shall duly prosecute their said appeal with effect, and moreover pay the amount of the costs, interests and damages rendered, and to be rendered, against them in case the said decree shall be affirmed in said Supreme Court, then

the above obligation to be void, otherwise to remain in full force and virtue.

GERTRUDE H. HARDIN. [SEAL]
THE COOK COUNTY CANAL
AND DOCK COMPANY.
By I. N. HARDIN, *Prest.* [SEAL]

Attest:
JOHN H. HARDIN,
[SEAL] *Secretary.*
ISAAC N. HARDIN. [SEAL]

Approved:
JOHN A. COOKE, *Clerk.*
O. K.
WM. PRESCOTT,
H. S. MECARTNEY,
For Shedd.

(Endorsed) Filed Aug. 23, 1897. John A. Cooke, Clerk.

Errors Assigned by Gertrude H. Hardin and the Cook County Canal and Dock Company, severally and respectively, as appearing from the Transcript from the Circuit Court of Cook County, filed October 6, A. D. 1897:

1. That said Circuit Court erred in refusing to hear or receive further testimony.

2. That said court erred in holding that the title to any of the lands, whether submerged or unsubmerged, was in the State of Illinois, and in refusing to give due effect to the patents through which appellants respectively deraigned title.

3. That said court erred in the division and apportionment of lands or accretions.

4. That said court erred in awarding to said Charles B. Shedd in such division or apportionment an undue quantity and proportion of such lands or accretions.

5. That said court erred in not following or observing the riparian rights of said appellants, respectively, in respect to the present or existing Wolf Lake, and in refusing to allow them, respectively, any frontage thereon.

6. That said court erred in not awarding or apportioning to the said Gertrude H. Hardin and Cook County Canal and Dock Company, severally and respectively, a due or proper quantity or proportion of the lands or accretions.

7. That the basis or principle on which the decree proceeded in declaring divisional lines is contrary to the law and the equity of the case.

8. That the decree is uncertain as to boundaries given, and is otherwise unjust to said appellants, severally and respectively.

DENT & WHITMAN,
MORAN, KRAUS & MAYER,
Attorneys for Appellants Gertrude H. Hardin and Cook County Canal and Dock Company.

And afterwards, to wit: on the 7th day of October, A. D. 1897, the following proceedings were had in said court:

GERTRUDE H. HARDIN, COOK COUNTY CANAL AND DOCK COMPANY, CHESTER B. RUSHMORE, FRANK. A CLEVELAND *vs.* CHARLES B. SHEDD. } Appeal from Cook.

And now, on this day, come the appellants Rushmore and Cleveland, and move the court for an extension of time in which to file briefs. Which motion, on due consideration, is denied.

And afterwards, to-wit: on the 2nd day of November, A. D. 1897, the following proceedings were had:

GERTRUDE H. HARDIN , COOK COUNTY CANAL AND DOCK COMPANY, CHESTER B. RUSHMORE, FRANK. A. CLEVELAND *vs.* CHARLES B. SHEDD. } Appeal from Cook.

And now, on this day, comes the said appellee, by counsel, and moves the court to dismiss the appeal of Rushmore and Cleveland for non-compliance with the rules of this court. Which motion is taken under advisement.

And afterwards, to-wit: On the 2nd day of November, A. D. 1897, the following proceedings were had·

GERTRUDE H. HARDIN *et al.* *vs.* CHARLES B. SHEDD. } Appeal from Cook.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that appellant hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court: Therefore it is ordered by the court that this cause be and the same is hereby taken under advisement.

And afterwards, to-wit: on the 4th day of November, A. D. 1897, the following proceedings were had:

GERTRUDE H. HARDIN, COOK COUNTY CANAL AND DOCK COMPANY, CHESTER B. RUSHMORE, FRANK. A. CLEVELAND
vs.
CHARLES B. SHEDD.
} Appeal from Cook.

And now, on this day, the court having duly considered the motion of appellee to dismiss the appeal of Rushmore and Cleveland, and being fully advised of and concerning the premises, it is considered and ordered by the court that the appeal of Chester B. Rushmore and Frank A. Cleveland herein be and the same is hereby dismissed at the cost of said appellants.

Placita.

AT A SUPREME COURT, begun and held at Springfield, on Tuesday, the sixth day of December, in the year of our Lord one Thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present—Joseph N. Carter, Chief Justice,
Alfred M. Craig, Justice, Benjamin D. Magruder, Justice,
Jacob W. Wilkin, Justice, Jesse J. Phillips, Justice,
James H. Cartwright, Justice, Carroll C. Boggs, Justice,
Edward C. Akin, Attorney General,
Edward A. Baxter, Sheriff,
Attest: Christopher Mamer, Clerk.

BE IT REMEMBERED, to-wit, on the twenty-first day of December, A. D. 1898, the same being in vacation after the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

GERTRUDE H. HARDIN, COOK COUNTY CANAL AND DOCK COMPANY
No. 4712 *vs.*
CHARLES B. SHEDD.
} Appeal from Cook.

And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error: Therefore it is considered by the court, that the decree aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court, that the said appellee recover of and from the said appellants his costs, by him in his behalf expended, and that he have execution therefor.

Stipulation as to Making up the Record.

In the Supreme Court of Illinois.

IN THE MATTER OF GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK CO.
vs.
CHARLES B. SHEDD.

It is hereby stipulated that the Clerk, in making up the transcript for the Supreme Court of the United States, will insert therein the following:

1. The style of this Court and of the Court in which the proceedings appealed to this Court occurred.

2. The names of the parties.

Here it will be observed that the names of the parties to the second appeal to this Court, namely, the one which was heard at the December Term, A. D. 1898, were as follows: Gertrude H. Hardin and Cook County Canal and Dock Company, appellants, and Charles B. Shedd, appellee.

This excludes the names of the parties who claimed adversely to said Charles B. Shedd, or to said Gertrude H. Hardin. It excludes the names of patentees under the survey of 1874. It also excludes the names of persons claiming tax titles. These were disposed of either by the decree of August 10, 1892, or that of August 11, 1897.

3. The original petition of Charles B. Shedd in 442 and 443.

The supplemental petition filed by Charles B. Shedd after the consolidation of the cases.

The order consolidating the two cases.

The amended answer of Gertrude H. Hardin to the petition of Charles B. Shedd, omitting any parts not necessary to show the claim of Gertrude H. Hardin.

The cross-petition of Gertrude H. Hardin *v.* Charles B. Shedd, omitting parts as above stated.

The answer of Charles B. Shedd thereto.

4. The schedule of exhibits of Charles B. Shedd showing his title.

This may be by copy of the list of exhibits, which shall be considered sufficient without copying documents other than the land office certificates, if offered at the hearing, and the patents to DeWitt and Douglas, respectively.

The plat of survey of Wolf Lake in Indiana.

The plat of survey of 1874 by Alexander Wolcott.

The plat of survey of 1834-35.

5. A schedule of the documents offered by Gertrude H. Hardin,

copying in full the land office certificate to John Holbrook, the patent to John Holbrook, and patent to William B. Egan.

The report of Commissioner Williamson, February 12, 1878.

The instructions to Alexander Wolcott for the survey of 1874.

6. The field notes of the survey of 1834 and 1835 so far as in the record will be copied, along with the plat of said survey.

7. The evidence of Charles B. Shedd given at the first hearing in the Circuit Court.

Jordan's exhibits "C" and "D."

The Cole, Craig and Handy maps.

8. The decree which was rendered August 10, 1892.

Part of transcript or certificate of evidence on second appeal, excluding parts relating to or made up as to matters of Cleveland and Rushmore.

The answers and cross-petitions of Conrad N. Jordan and other defendants claiming under the survey of 1874 and under tax claims and claims of possession, and all documentary and other evidence relating thereto, except as herein provided, may be excluded, and only such parts of the testimony given on the hearing as may be necessary to show the physical condition of the lake and lake bed may be included.

The clerk will annex to the transcript:

Copy of opinion of Mr. Justice Phillips.

Copy of opinion of Mr. Justice Wilkin.

In waiving the setting out in full of the documentary evidences of title following the patents (schedules only being inserted in the transcript), it is understood that the sufficiency of the various deeds to pass the patent title is not to be questioned; and especially the plaintiffs in error waive any objection to the paper title of Charles B. Shedd to the patent title which was vested in Stephen A. Douglas in his lifetime, as per the patent to him to be set out in the transcript.

It is also stipulated that the opinions of Judge Tuley, written and oral, at the first hearing, and written or made up and sent to the Supreme Court at the second hearing, and the opinion of Judge Seaman on the hearing of suggestions as to executions or writ of restitution in Hardin *v.* Jordan, in U. S. Court, will be made an appendix to the Brief of counsel for plaintiff in error in the Supreme Court of the United States.

THOMAS DENT,
Of Counsel for Plaintiffs in Error.
H. S. MECARTNEY,
Counsel for Shedd.

January 30, 1901.

IN THE SUPREME COURT OF ILLINOIS

I, CHRISTOPHER MAMER, Clerk of the Supreme Court of Illinois, and keeper of the records and files thereof, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the above and foregoing is a transcript of the record and proceedings referred to in said writ, as the same record and proceedings appear in said court, which said transcript also pursues the stipulation entered into by the parties mentioned in said writ of error, by their counsel, which said stipulation is incorporated in this transcript.

As an appendix to this transcript a true copy of the Opinions of said Supreme Court of Illinois, is annexed, as a part hereof, the same being a part of the record of said Supreme Court required by said writ of error to be shown, to wit:

Opinion of Mr. Justice Phillips, filed January 17th, A. D. 1896.

Opinion by Mr. Justice Wilkin, filed December 21st, A. D. 1898.

GIVEN under my hand and the seal of said Court, at my office in the City of Springfield, this 4th day of March, A. D. 1901.

CHRISTOPHER MAMER,
Clerk.

L. S.

Rev. Stamp 10c.

APPENDIX A.

1. *Opinion of the Supreme Court of Illinois, filed Jan. 17, 1896.*

STATE OF ILLINOIS, SUPREME COURT,

CENTRAL GRAND DIVISION.

AT A SUPREME COURT, begun and held for the Central Grand Division of the State of Illinois, at Springfield, on the first Tuesday in June, A. D. 1893.

Present—David J. Baker, Chief Justice.

Benjamin D. Magruder, Justice. Alfred M. Craig, Justice.
Joseph M. Bailey, Justice. Simeon P. Shope, Justice.
Jacob W. Wilkin, Justice.

(Mr. Justice Jesse J. Phillips succeeded the late Mr. Justice John Scholfield, June 14, 1893. Mr. Justice Joseph N. Carter succeeded Mr. Justice Simeon P. Shope, June 16, 1894.)

To wit: On the 17th day of January, A. D. 1896, there was filed in the office of the Clerk of said court an opinion of said court, in the words and figures following:

J. ENSIGN FULLER *et al*
vs.
CHARLES B. SHEDD *et al*

FRANKLIN A. CLEVELAND
vs.
GERTRUDE H. HARDIN.

ELIZABETH P. THOMAS.
vs.
CHARLES B. SHEDD.

CHARLES E. RAND
vs.
GERTRUDE H. HARDIN.

SOUTH CHICAGO AND SOUTHERN RAILROAD CO.
vs.
CHARLES B. SHEDD AND GERTRUDE H. HARDIN.

} Appeals from Cook.

On the 29th day of June, 1888, Charles B. Shedd filed his petition under the Burnt Records Act, seeking to establish the record

title to fractional section 29, in township 37 north, range 15 east of the 3rd P. M., in Cook County, Illinois. The United States issued letters patent for this fractional tract of 7. 37/100 acres to Stephen A. Douglas on October 1st, 1855.

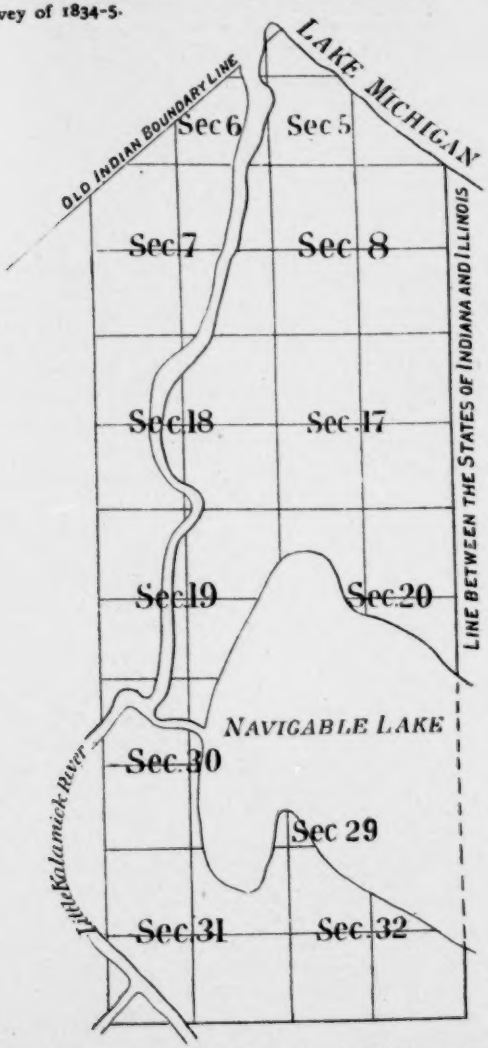
On the 30th of June, 1888, Shedd filed another petition under the Burnt Records Act seeking to establish the record title to the southeast quarter of fractional section 20, in township 37 north, range 15, east of the 3rd P. M., for which the United States issued letters patent for the fractional tract of 4. 53/100 acres to Horatio B. DeWitt on March 1, 1848.

To each of these petitions a number of parties were made defendants, some disclaiming interest, others being defaulted, and others filing answers, and certain defendants answered and also filed cross-petitions bringing into court other defendants. Certain other parties intervened and became parties defendant, and answered and filed cross-petitions.

It would be beyond the reasonable limits of an opinion to state the various averments of the petitions, answers, cross-petitions and the answers thereto appearing in this voluminous record. For the questions arising in this record we will briefly abstract the cross-petitions of Gertrude H. Hardin and the answers and cross-petitions of J. Ensign Fuller, Conrad N. Jordan, John I. Bennett, Frank I. Bennett, Franklin A. Cleveland, Elizabeth P. Thomas, Charles E. Rand and the South Chicago and Southern Railroad Company. Gertrude H. Hardin avers she is the owner in fee of the southeast fractional quarter and the east fraction of the southwest fractional quarter of section 19, the northeast fractional quarter and the east fraction of the southeast fractional quarter of section 30, township 37 north, range 15, east 3rd P. M., which lands were, by the United States, by letters patent, conveyed to John Holbrook on May 20, 1841.

These fractional tracts so claimed to be owned by Shedd, who filed the original petition, and by Gertrude H. Hardin in her cross-petition, are lands surveyed for the United States in 1834 and 1835, and were adjacent to a lake lying partly in Indiana and partly in Illinois, known as Wolf Lake. The lands so surveyed were meandered on the lake, and were subsequently conveyed as stated. By *mesne* conveyances Shedd acquired title to the lands above described as being patented to Douglas and DeWitt. Of the lands entered by Holbrook, Gertrude H. Hardin acquired title by descent and *mesne* conveyances. Wolf Lake, as thus meandered, comprises a body of water covering several thousand acres of land, and when originally surveyed was believed to be a navigable lake, and was so designated by the field notes of the surveyor, in the original survey. The plat of the original survey may be given as follows, so far as the lake is within the State of Illinois:

Outline of official plat of Fractional Township 37, N., R. 15 E. of survey of 1834-5.



In pursuance of a circular issued by the general land office on July 13, 1874, a survey of all lands within the meandered lines was made, including not only that above the water, but also that then covered with water, which was of but slight depth. This survey was reported to the general land office of the United States, and was approved, and the lands so surveyed offered for sale and sold to various parties. The lands as thus surveyed and sold were platted as shown by the annexed diagram.

Between fractional section 29 and fractional southwest quarter of section 20 owned by Shedd, as shown by the evidence, there existed at the time of the original survey a ridge which was but slightly covered with water, and at several points along this ridge islets existed, one having trees growing thereon. From that part of Wolf Lake in the State of Indiana there was a shallow, marshy connection with Lake Michigan, but by reason of the action of the waves in Lake Michigan a sand bar had been formed, which, except under certain conditions, prevented the flow of water directly from Wolf Lake into Lake Michigan. An outlet from the west side of the lake connected with the Calumet river, through which the water flowed from the west part of the lake. At different seasons of the year, as early as 1841, the ridge was often above the level of the lake, and in the course of a few years the ridge materially increased in width and was above the level of the water at ordinary stages. The land on the ridge and around the margin of the lake thus above the mean level of the lake existed in 1874, at the time the circular was issued by the general land office for the second survey which is above shown.

The second diagram above, however, does not show the lands between the meandered line and the water as it was at the time of survey in 1874, nor does it show the ridge which, at ordinary stages, was above the water and contained a large number of acres of dry land. The diagram is used, not as showing the dry land on the ridge and margin of the lake within the meandered lines, but as showing the lines of the survey of 1874. By reason of this ridge the water was divided into two lakes, that to the east known as Wolf Lake and that to the west called Hyde Lake. The land within the meandered lines, which was the bed of the lake as surveyed and platted in 1835, and which was sold by the United States after the survey of 1874, was purchased by different persons.

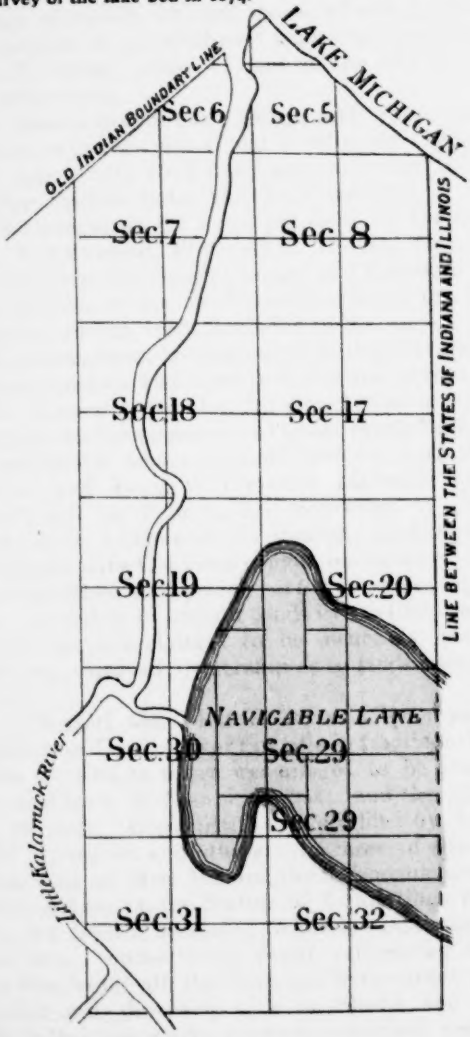
The cross-petition of Conrad N. Jordan avers he is the owner of the south half of the northwest quarter and the north half of the southwest quarter of section 29, and also of the west half of the southwest quarter of section 20, the south half of the east half of the southwest quarter of section 20 and lot 2 of the southwest quarter of section 20, and also that he is the owner in fee simple of lots 2 and 3 in the southeast quarter of section 20 and the east half of the northeast quarter of section 30, the northeast quarter of the southeast quarter of section 30, and lot 3 of the southeast quarter of section 30, except 19.28 acres off the south side thereof, all situate in township 37, north of range 15, east of 3rd P. M., in Cook County, Illinois.

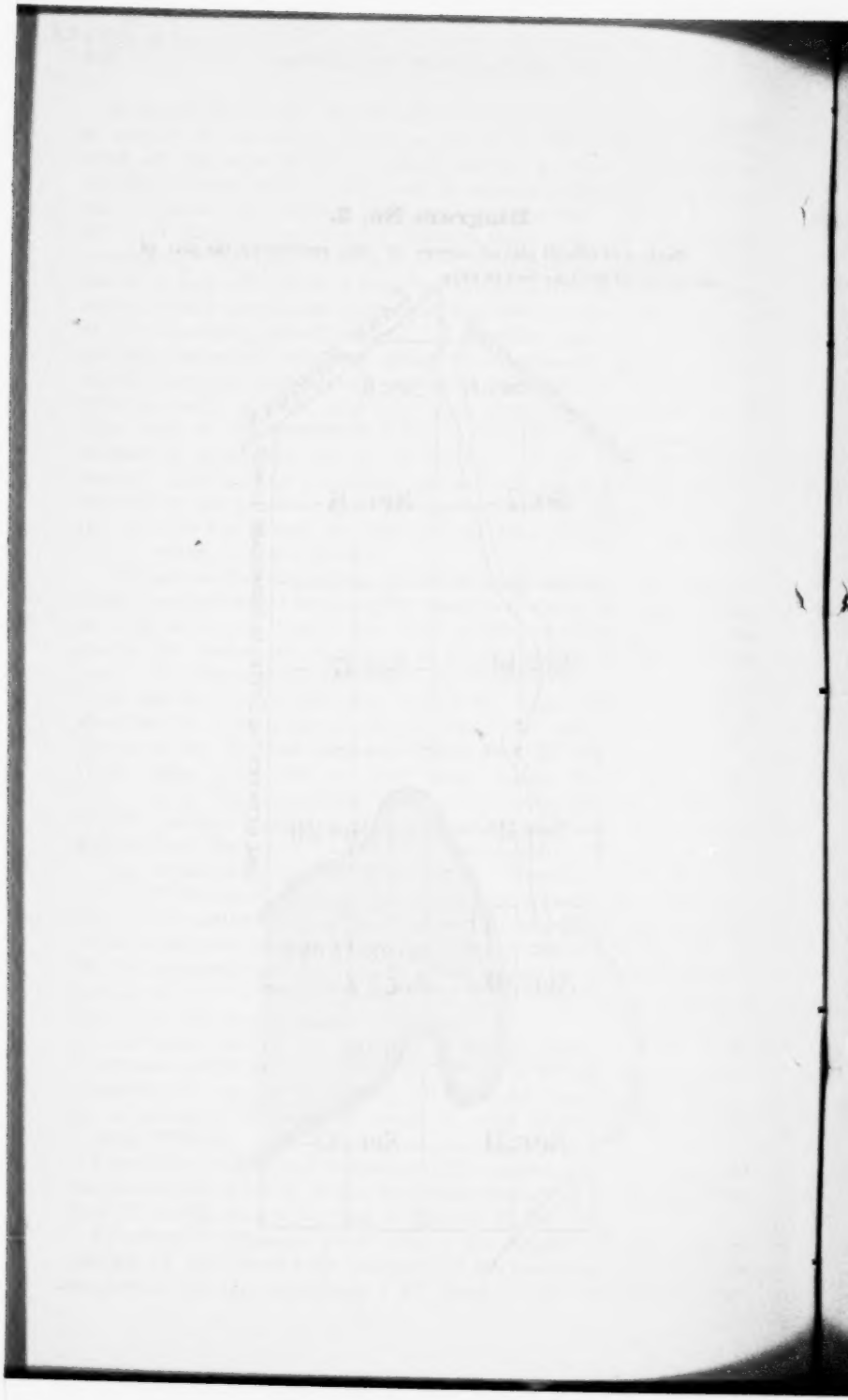
Franklin A. Cleveland avers he is the owner of 19.28 acres off the south side of lot 3, in the southeast quarter of section 30, township 37, north, range 15, east of the 3rd P. M.

Elizabeth E. Thomas avers she is the owner of the southeast quarter of the southwest quarter and the southwest quarter of the southwest quarter, excepting 7.37 acres in the southwest corner

Diagram No. 2.

Outline of official plat of survey of 1835 embracing the plat of the survey of the lake bed in 1874.





thereof, all in section 29, township 37, north, range 15, east of the 3rd P. M.

Charles E. Rand avers ownership of all that part of lot 1 of the northeast quarter of section 30 lying west of a line 832 feet east of and parallel to the west line of said northeast quarter of section 30, township 37, north, range 15, east of the 3rd P. M.

J. Ensign Fuller avers ownership of lots 2 and 3 of the southeast quarter of section 19, and the southeast fractional quarter of the east fraction of the southwest fractional quarter of section 19, township 37, north, range 15, east of the 3rd P. M. And of tax titles on other lands.

By its answer the South Chicago and Southern Railroad Company sets up as against Shedd and Hardin, and alleges it owns the right of way of its road over land described, which it acquired from parties holding under the 1874 survey.

These averments in the cross petitions of Conrad N. Jordan, Franklin A. Cleveland, Elizabeth E. Thomas, Charles E. Rand, J. Ensign Fuller and the South Chicago and Southern Railroad Company are of title by means of conveyances by the United States by letters patent, of the lands included in the survey of 1874, which by *mesne* conveyances, became vested in them severally, as alleged in their several answers and cross-petitions and certain tax titles.

Frank I. Bennett avers that fractional section 29, 7.37 acres, was sold for a special assessment levied by the South Park Commissioners, and he became the owner of undivided one-half thereof by *mesne* conveyances, and James W. Converse was owner of the other undivided half, and he, Bennett, had conveyed, by deed delivered in escrow to John I. Bennett, his interest, conditioned that John I. Bennett should have Converse convey his interest. John I. Bennett filed cross-petitions for specific performance, as against Converse, averring ownership in certain lands by tax title, and averring equitable interest in lands claimed to be owned by Shedd and Jordan, and claiming riparian ownership as to lands adjacent to fractional section 29.

John I. Bennett and Fred F. Bennett, by cross-petition to the cross-petition of Hardin, aver tax title in fractional northeast quarter of section 30, title to which was alleged to be vested, the half interest in said tract in John I. Bennett, and the quarter interest in Fred F. Bennett. Cross-petitions were filed by Andrew Crawford, James W. Converse, and others. In most of these cross-petitions, other than that of Mrs. Hardin, the defendants aver occupancy and possession, and set up the Statute of Limitations, etc.

We do not deem it necessary to further state the pleadings or the evidence here. Issues being made, on hearing the court entered a decree dismissing all the cross-petitions except that of Gertrude H. Hardin, and decreeing title in Shedd and Mrs. Hardin to the lands in their respective petitions described, and that as riparian owners they took the bed of the lake to its center, and all lands above the waters as well as those covered by the waters, and that the

survey of 1874 was invalid, and the title to lands sold by the United States and patented, describing the lands within the meandered lines, were void as against such riparian owners, and the tax titles were void. The court further found that the fractional southwest quarter of section 20, at the time of the survey of 1835, extended to the south line of the section, and the fractional section 29, at the time of the survey in 1835, extended to the quarter section line north, and both points were dry land at the time of the survey above mentioned. There was some contention as to the respective rights of Hardin and Shedd as to their lines. From that decree this appeal was prosecuted by J. Ensign Fuller, Conrad N. Jordan, John I. Bennett, Frank I. Bennett, Franklin A. Cleveland, Elizabeth E. Thomas, Charles E. Rand and the South Chicago and Southern Railroad Company. Mrs. Hardin also assigned errors, which were afterwards withdrawn. The errors assigned by each are substantially the same as to their merits, viz:

That the court erred in holding that the patents from the United States, under the survey of 1834 and 1835 of lands bounded by the lake, extended to the land under the lake, and in holding that the meander line of that survey was not a line of boundary, and that the survey of 1874, and the patents issued thereunder, were invalid and void, and in holding that there was no possession adverse to Shedd and Hardin by actual residence for seven years, and in holding that the better title was not in the claimants under the second patents, and in dismissing the cross-petitions of such claimants.

PHILLIPS, J.:

The main question presented on the pleadings and facts appearing in this record is, whether the title of the riparian owner on a lake meandered in the original survey by officers employed by the United States for surveying public lands, extends to the center of the lake or stops at the water's edge. The question is of much consequence and deserving of careful consideration. In states bordering on the great lakes of the north it is of paramount importance, and the adjudications of the courts of such states are not harmonious. Where lakes are of such size that in making the original survey they are meandered, we know of no principle of construction by which one rule should be applied to small lakes and another to large ones. (*Bradley* v. *Rice*, 13 Me., 201.) The impossibility of establishing a reasonable rule that a right should be determined by the extent of a lake, would, in the absence of legislation determining that question, lead to conflicting and absurd conclusions, based on no rule regarding the effect of a survey of lands bordering on a lake. The real question must be resolved by determining whether the riparian owner of lands meandered on a lake by the original survey takes to the water's edge as meandered, or takes to the center of the lake.

The body of water marked "Navigable Lake" in the original survey is a lake two or three miles long from east to west and about the same north and south, the greater part being in the State of Indiana. That part in Illinois at the time of the original survey

covered about 1,300 acres of land. This lake is situated three or four miles south of Lake Michigan and in the State of Indiana, and has a natural outlet towards the northeast into the latter lake, which outlet is frequently subject to interruption by the formation of a sand-bar upon the shore of Lake Michigan. There was also an outlet at the west side of the lake into Calumet River. The effect of winds and storms on Lake Michigan which would raise its water at the south would also operate to change the level of the water in this small lake and cause it to be higher. Its level was also affected by rains and evaporations. From the northeast corner of the southwest quarter of fractional section 20, in township 37 north, range 15, east of the third principal meridian, there extended in a southerly direction a ridge. From the southeast corner of fractional southeast quarter of section 30, and the southwest corner of fractional section 29, a ridge extended in a northerly direction. The extent to which this ridge projected from the north was about 220 rods and the extent of the projection from the south was about 160 rods. The width of these ridges varied, at some places being twenty-eight rods wide and at others wider, and they were dry land at ordinary stages of water. At other places they were still narrower. This was the case at the time of the original survey. Along these ridges, in their projections from the north and south, trees of different varieties grew, some of which were three feet in circumference. These points, at their extremities, were about eighty or ninety rods apart, and between them, and along the sides of the ridge and around the margin of the lake within its meandered line, reeds and coarse grass grew in the water. In the marshy depressions between these points were two islands, one a mere knoll, the other containing about one or two acres, on which trees and bushes grew. This was substantially the physical condition, in ordinary stages of water, at the time of the 1834 and 1835 survey. The level of the waters of Lake Michigan at a certain stage was adopted as the starting point of levels in Cook County. The extreme rise and fall of that lake is from five feet above datum to one foot below datum. The level of the waters of Wolf Lake, when the same reach about the meandered line of the original survey, would be about 2.2 feet above datum. Whilst in the original survey this Wolf Lake was by the field notes designated a navigable lake, it was not navigable in fact. Such being the surrounding conditions at the time of the original survey, the changes from that time to the survey of 1874 were not great, such as existed resulting from the slow filling of the lake bed and from other natural causes. Since the survey of 1874, by reason of the improvement of Calumet River and the wearing out of deeper natural channels from the lake and an increased flow therefrom, and the same natural causes continuing to raise the bed of the lake, there has been a recession of the waters, causing dry land on both sides of the ridge, and around the borders of the lake; the recession was such that between the meandered lines and the water

there was uncovered, and the greater part of the year wa ry land around the lake, a strip twenty to twenty-five rods wide. In this condition of the lake a survey of the lands and lake bed within the meandered line was made in 1874, and the lands thus surveyed offered for sale and sold, and patented by the United States to various parties, and the greater part of said lands so patented by *mesne* conveyances came to appellants, as alleged in their respective cross-bills.

At the time this survey was made the evidence showed the waters were waded by the chain men, though differing in depth from a few inches to about five feet, and almost all the land surveyed was then covered by water. The lands in the original survey, as made in 1834 and 1835, bordering on the lake, were meandered, and these fractional tracts so sold were patented by the United States to the purchasers thereof. So far as we have occasion to decide the questions in this record, we need refer to none but the entries of Holbrook, De Witt, Egan and Stephen A. Douglas. Douglas had entered fractional section 29, 7.37 acres, and De Witt had entered the fractional southwest quarter of section 20, 4.53 acres. These lands, by *mesne* conveyances, became vested in Shedd. Holbrook entered the southeast fractional quarter of section 19, 79.11 acres, the northeast fractional quarter 30, 28.71 acres, and the east part of the southeast fractional quarter of section 30, 2.04 acres, and the title to the same passed by descent to Gertrude H. Hardin, who also acquired the title to the west fraction of the southeast fractional quarter of section 30, 25.09 acres, which had been entered by William E. Egan. Shedd filed his petition to have his record title established in the lands so acquired by him, and Mrs. Hardin by her cross-petition sought to have record title established to the lands in her cross-petition described, which she had acquired as above stated. The numerous purchasers of lands within the meandered lines under the survey of 1874 having acquired and set up their titles, by cross-petition asked relief in the same manner as to the confirmation of their titles. By the decree of the Circuit Court of Cook County all the cross-petitions were dismissed except that of Mrs. Hardin, and the court established title in Shedd and Hardin, and held they, by riparian rights, acquired title to the bed of the lake and took to its center. By this decree purchasers of not exceeding 153 acres of land from the government acquired title *eo instanti*, to the bed of the lake and to more than 1,100 acres of land in addition to that for which they paid.

The chief argument of appellants is, the meander line in this case constitutes the boundary. At common law the title of a riparian proprietor bounded by a navigable stream extends only to high water mark, and in streams not navigable the rights of the riparian proprietor extended to the middle thread of the current. But at the common law, arms of the sea and only streams where the tide ebbed and flowed were deemed navigable, and streams above tide water, though navigable in fact, were not deemed navigable

in law. Under this rule of the common law the principle was applied at an early period in the history of the state, and held with reference to streams in and bordering this state, that the riparian proprietor in a grant bounded on or upon the margins of rivers or streams, whether navigable or not, took to the center thread of the stream. (*Middleton* v. *Prichard*, 3 Scam., 510.) The rule there announced has been adhered to in this state by many adjudged cases since that time; among others we cite *Houck* v. *Yates*, 82 Ill., 179, and *Fuller* v. *Dauphin*, 124 *Id.*, 542. The same rule is adopted in most of the states, though others hold, with reference to streams navigable in fact, the riparian owner takes only to ordinary high water mark, and the banks between high and low water mark and the bed of the river belong to the state. As a result of the rule adopted in this and most of the states in reference to streams, it necessarily followed that in a grant of land bordering on a river which was meandered, for the purpose of determining quantity in a fractional tract, the meander line, in and of itself, was held not to be a boundary line. *Middleton* v. *Prichard*, *supra*; *Trustees* v. *Haven*, 5 Gilm., 548; *Houck* v. *Yates*, *supra*; *Fuller* v. *Dauphin*, *supra*; *Walker* v. *Board Public Works*, 16 Ohio, 545; *Jones* v. *Pettibone*, 2 Wis., 308; *Marquette Boom Co.* v. *Adams*, 44 Mich., 403; *Kraut* v. *Crawford*, 18 Iowa, 549; *Sherlock* v. *Bainbridge*, 41 Ind., 35; *Schurmeir* v. *St. Paul R. R. Co.*, 10 Minn., 82; *Minto* v. *Delaney*, 7 Ore., 242; *Morris* v. *Benson*, 61 Mo., 345.

As thus construed, this rule gives the riparian owner accretions and islands forming within his grant, and where, by gradual accretions, the thread of the stream was slowly changed, under the application of the same rule his grant followed the channel and still went to the thread of the stream. This rule of the common law had engrafted on it this further principle: where the course of a stream forming a boundary is suddenly changed, the relicted soil remains according to the former bounds, and a grant bordered thereon does not follow to the thread of the stream, as in the new channel. (Hargrave Tracts de Jure Maris; Angell on Water Courses, Sec. 57; Gould on Waters, Sec. 159; *Spigener* v. *Cooner*, 8 Rich., 301; *Dwinel* v. *Barnard*, 28 Me., 469; *Lynch* v. *Allen*, 4 Dev. & Bat., 62.)

It resulted from this rule of the common law, that where a stream was meandered in the original survey, and conveyance made and price paid for the quantity within the meandered lines, the grant conveyed to the thread of the stream, and therefore the boundaries of the lands were not determined by the meander line. While such is the rule in states adopting the rule of the common law, yet there are cases where the meandered line would be of itself the boundary, as where the line run by the government surveyors, by mistake or fraud in surveying the public lands, leaves between such line and the stream or lake a considerable body of land, on which is vegetation, etc., above the ordinary stage of water. In such case the surveyed land is all that is granted by the United States, and the pat-

entee is not a riparian proprietor, his boundary being fixed by the meandered line.

In *Fulton* v. *Frandolig*, 63 Texas, 330, a shell reef, varying in width from twenty to sixty yards, ran from the meandered line into the bay for about a mile, and the patentee claimed this shell reef with the accretions, on the ground that the meander line should yield to the course of the bay; but it was held that, as the evidence (derived from the field notes) showed that the surveyor in fact ran across the shell reef for the course and distance, the reef was not included in the grant.

In *Granger* v. *Swart*, 1 Wol., 90, the jury were instructed as follows: "The patents and deeds under which the defendant claims do not pass the title to the premises in question, unless, at the date of the entries on which they issue, the Rock River where it is called a river, and Lake Koshkonong where it is called a lake, extended to and bordered upon the meandered line which constitutes the boundary of the lands described in the patents. In other words, if, between the meandered line, which by the government survey was made one of the boundaries of the land sold to Walker, and the bank of Rock River and shore of Lake Koshkonong, there was at that time a body of swamp or waste land or flats on which timber and grass grew, and horses and cattle could feed and hay be cut, then the patents of Walker did not cover this land, but were confined to the actual limit of said meandered line. On the other hand, if, when the entries were made, the bank of the river and shore of the lake at an ordinary stage of water, were where this meandered line was represented by the United States survey, and the land in controversy has since been formed by a receding of the water or by accretion to the shore and bank, then it became the land of the defendant or of Walker, as the title might be in one or the other. If the first of these positions be found by you to be true, the defendant has no title to the land; if the second be true, he has title to the addition made by the accretion."

In *Lammers* v. *Nissen*, 4 Neb., 245, in deciding the case the court says: "Another inquiry involved in the consideration of this case is as to what is the effect which a meandered line, purporting to have been run along the bank of a stream, may have in regard to land at the time lying between it and the bank of the stream, and remaining unsurveyed. And in respect to this inquiry, I think it sufficient to observe, that as to public lands of the United States, conceding the rule to be well settled, that a meandered line bordering on the bank of a stream is not to be considered as the boundary of the tract, but simply as defining the sinuosities of the bank of the stream, and as a means of ascertaining the quantity of the land in the fraction subject to sale, yet the question whether such line does in fact define the sinuosities of the bank of the stream or not is one which may be determined by evidence *aliunde*. The mere fact that it is run and is designated upon the plats as a meandered line cer-

tainly can not be conclusive in the matter. To establish the doctrine that such meandered line is conclusive would estop the government from disposing of lands left unsurveyed between such line and the bank of the stream. It would prevent the correction of mistakes made by surveyors in such case, and would be in direct conflict with the well-settled rule of law defining what is an accretion to land. In *Granger* v. *Swart*, *supra*, the principle is enunciated, that if, between the meander line by which the government survey was made, and the bank of the river, there is, at the time, a body of swamp or waste land or flats, on which timber and grass grew and horses and cattle fed, then the patents for the land surveyed would not cover this land, but must be confined to the actual limits of the meander line and include no more." The title of defendants, acquired under a junior survey, to the lands lying between the meander line and the actual bank was therefore held good. In that case it was represented on the plat, and the surveyor reported to the department of interior, that the meander line ran at the west of the marsh and was along the line of the Missouri River, and the intervening 1,000 acres between the real bank of the river and the meander line, was navigable water. The line as made was mistakenly run, and the surveyor omitted this large tract from his survey, and it was subsequently surveyed and sold.

In *Glenn* v. *Jeffrey*, 75 Iowa, 20, a tract was situated on the east bank of the Missouri river, the facts being similar to those in *Lammers* v. *Nissen*, *supra*, and the trial court instructed the jury: "Under this evidence you are instructed that the plaintiff failed to show title in himself to the land claimed by the defendant. The plat and field notes introduced herein show that lot 3 was surveyed and platted and located upon the north side of certain water, which was at the time of the survey supposed to be the Missouri River. It is shown by the Adkins survey and other evidence in the case that lot 3 ran, not to the Missouri River, but to the waters of a certain bayou, and that beyond this bayou, and between it and the Missouri River, was other land—the land claimed by the defendant. The evidence shows that the land between this bayou and the river was not surveyed. * * * The land in controversy is lot 3 in section 18, township, etc., and the plaintiff introduced evidence showing title in himself from the government. The only controversy is whether the lot, as described, extended to the Missouri river." In commenting on that instruction it was said by the Supreme Court: "The evidence warranted the court in giving the instruction it did. There was no controversy as to the facts. It is true that the government plat and field notes described the meander line as being at the Missouri river, and therefore it is claimed that lot 3 extended to the river. In fact, however, instead of running the meander line along the river, it was run along the bayou some distance from the river. The land in question cannot be regarded as accretion; but existed as it now does when the survey was made. The court rightly directed the jury

to find for the defendant. The land never was, in fact, surveyed by the government, and never sold or conveyed to the plaintiff."

In *Bissell* v. *Fletcher*, 19 Neb., 726, the plat and patent to plaintiff showed lot 3 to contain 52.60 acres, and to run north to the Republican River. Defendant claimed lots 6 and 7, which, in fact, was land between the river and where the plat showed the bank to be. The court says: "The contention of the plaintiff is that lot 3 extends to the river, and notwithstanding the fact that lot 3 contains all the land the plaintiff purchased and paid for, and the effect of the extension of the line would be to give him about 117 acres of land to which he seemed to have no equitable right, still he contends the law declares the land to be his."

Upon a rehearing of this case, (43 N. W. Rep., 350), the court further said: "There is no proof whatever that the land claimed by the plaintiff is an accretion to lot 3. In fact, all of the proof tends to show that it is not. The defendant has purchased his land, as part of the public domain, from the United States, and it would be rank injustice to rob him of his property, and give it to the plaintiff, who is already in possession of all of the land that he purchased and the government sold to him."

In *James* v. *Howell*, 41 Ohio St., 696, the court refused to extend a meander line across a space designated as impassable marsh and water, so as to include two islands, one containing about 36 acres and the other 18 acres, but confined the boundary to the meander line. The computed acres in the grants did not include either the marsh, water or islands.

In *Shoemaker* v. *Hatch*, 13 Nev., 261, the court said: "To determine whether a bar or island is part of the land on either side of a stream, account must be taken, in every case, of a variety of circumstances, such as the relative size and permanence of the channels, the size of the island compared with the size of the stream, and the conformity or divergence of course between the main line and the main channel. It is a question of fact, to be determined from all the surrounding circumstances, whether the land between the meander line and the shore of the lake or water course is included in the survey."

In *Martin* v. *Carlin*, 19 Wis., 454, there was a mistake in the original survey and meandering of Rock River, so that there was more land than the survey called for by the field notes. It was held, where there is a mistake in the government survey of a fractional lot, so that either the line of a meandered stream or a quarter section line (both of which were called for by the survey as constituting the line) must be abandoned, the quarter section line should be adhered to as the more certain call.

The decision of these cases is based on sound reasoning and on equitable rules as to property rights. To each person is given all he purchased, but not a quantity that would be inequitable or unjust as against the government. Nor are these cases in conflict with the decisions in this state on that class of questions.

In *Middleton* v. *Prichard*, 3 Scam., 510, there was a long slough running between a small island or peninsula and the main land, in which the river (Mississippi) flowed two or three months in the year. The meander line ran along this slough on the main land twenty or twenty-five feet up from the channel of the slough in high water, the eastern boundary of this slough forming, therefore, the eastern boundary of the river, and the boundary was carried beyond the meander line to this bank of the river. The owner's land thus bordering on the river and going to the center thereof, he was entitled to the island in controversy.

In *Canal Trustees* v. *Haven*, 5 Gilm., 548, the divergence between the meander line and the river line is not disclosed.

In *Houck* v. *Yates*, 82 Ill., 179, the strip of land between the meander line and the natural boundary (Mississippi river) varied in width from one-half of a rod to three rods, and contained in all four or five acres.

In *Fuller* v. *Dauphin*, 124 Ill., 542, the land in controversy was an island in the Mississippi river of five acres, which was held to pass under a patent of about twenty-three acres on the main land. In this case there does not appear to have been any divergence between the meander line and the natural boundary of the Mississippi river.

Railroad Company v. *Shurmeir*, 7 Wallace, 272, is in its facts similar to *Middleton* v. *Pritchard*, *supra*. The main body of the land contained 9.28 acres; the parcel in dispute was 2.78 acres. The latter was a narrow strip of low land, constituting a bar or island, about ninety feet wide in its extreme width and 160 feet long, extending along the meander line.

From these cases it would follow the construction of the grant would be: where a narrow strip of land lies between the meander line and the natural boundary, as a stream or river, and its proportions are much smaller than the land granted, it would be included in the grant, and the center of the stream or river would be the boundary, unless a different intention was manifested by the terms used. Where the land outside the meander line is so grossly in excess of that sold that it is apparent there is fraud or mistake in the survey, the meander line would be the boundary.

In *Mitchell* v. *Smale*, 140 U. S., 406, it was said: "We do not mean to say that in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud, in which case the government would have the right to recall the survey and have it corrected by the courts, or in some other way. Cases have happened in which, by mistake, the meander line described by the surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government. Nor do we mean to say that in granting land bordering on a non-navigable lake or stream the authorities might not formerly, by express words, have limited the granted premises to the water's edge and reserved the

right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective states of all swamps and overflowed lands therein this cannot be done."

From these cases it will be seen, if there is such a mistake by the omission of lands in a survey between the meander line and the water that the proportion to that sold is great, it may be corrected by a re-survey. In the case here before the court the field notes show the running of the meander line was across the ridge and at both the south and north sides of the lake. There was not such an omission of land from the survey that it is apparent a mistake was made, nor is there in the survey any evidence of fraud in the manner in which it was done. Whether a riparian proprietor on a lake takes the bed of the lake is a question on which the decisions of the different states are conflicting. Whilst the riparian proprietor takes to the center of a stream, the stream will still exist notwithstanding changes by accretions, etc. The same reason for the rule does not exist where land borders on a lake, as by recession of the water the bed of the lake may become dry land and the lake cease to exist. The grant of land on a lake would, on the instant of the grant, be a conveyance to the center of the lake, if the same rule existed as with reference to rivers. The determination of boundary lines to the center of the river is not attendant with any serious difficulty, but the irregular borders of a lake would render the determination of lines in the bed of the lake between riparian proprietors of almost impossible solution. This, as well as the injustice of holding that the purchaser of a small rim of the lake, consisting of but a few acres, would at once become the owner of thousands of acres of a non-navigable lake, has caused many courts to hold the riparian proprietor takes only to the water's edge. As declaring this rule we cite the following cases, among others:

In *State* v. *Gillmanton*, 9 N. H., 461, the question involved being the boundary of a town, it was said: "The rule for the construction of grants bounding on rivers is, * * * where a grant is made extending to a river, and bounding upon it, the center of the stream is the line of the boundary, if there are no limitations in the grant itself. But in relation to grants on ponds, lakes or other bodies of standing fresh water that principle does not apply, but the grant extends only to the water's edge."

In *Mariner* v. *Schultz*, 13 Wis., 692, the court approved the instruction of the inferior court, which directed that in a grant of land bordering upon a pond the title did not extend beyond the natural shore.

In *Deidrich* v. *N. W. U. R. Ry. Co.*, 42 Wis., 248, the court say: "The rule that the title of the riparian owner upon a natural lake or pond does not extend beyond the natural shore, appears to be very generally, almost universally, recognized, and is discussed by Cole, C. J., in *Delaplaine* v. *Ry. Co.*, *supra*. It is unnecessary to repeat here what is there said, and in which we all concur. Indeed, the

position was affirmed in this court as far back as *Mariner* v. *Schultz*, 13 Wis., 692."

In *Fletcher* v. *Phelps*, 28 Vt., 257, the court, on the question of boundary, said: "Where land is sold and bounded on the river or stream of water above tide-water, the grant extends to the middle of the channel or thread of the stream. That is the legal effect of the conveyance, and cannot be varied or controlled by parol testimony. * * * A different rule prevails where land is conveyed bounded on large natural ponds or lakes; in such case, the grant extends to the water's edge, or if the * * * lake or pond has a definite low water mark, the grant will extend to low water mark."

In the case of *Bradley* v. *Rice*, 13 Me., 201, the court say: "It is true that where land is bounded on the river or stream where the tide does not ebb and flow, the owner's title, by construction of law, extends to the center or thread of the stream. But Flying Pond is not a river or stream. No case has been cited, nor have we found any, where that case of construction has been extended to a pond or lake. Had the land been bounded upon a river or stream, or artificial pond created by expanding a stream by means of a dam, the riparian proprietor would go to the thread of the stream. This is law well settled and understood. But it has not been so settled in regard to ponds and lakes, nor are we aware that there can be one construction for small ponds and lakes and another for large ones."

The same principle is recognized in *Robinson* v. *White*, 42 Me., 209; *Nelson* v. *Butterfield*, 21 Me., 220; *Wood* v. *Kelley*, 30 Me., 471; *Mansur* v. *Blake*, 62 Me., 38.

In *Kanouse* v. *Slockbower*, 48 N. J. Eq., 42, the court was called upon to decide whether a devise of land bounded by a margin of the lake carried the devise to the center of the lake or whether the lake bed passed to the residuary devisees, and the court said:

"The law is well settled that a grant of land bounded upon or along a river, above tide water, carries the title of the grantee to the center of the stream, if the title of the grantor extends that far, unless the terms of the grant show that it was the intention of the parties that the grantee's title should not extend to that point. But this doctrine has not * * * been held to apply to grants of land abutting upon fresh-water lakes and ponds."

Angell on Water Courses (Sec. 41) says: "When land is conveyed bounding upon a lake or pond, if it is a natural pond, the grant extends only to the water's edge."

In *State of Indiana* v. *Milk*, 11 Fed. Rep., 389, Judge Gresham said: "That while a general grant of land on the river or stream non-navigable extends the line of the grantee to the middle or thread of the current, the grant on a natural pond extends only to the water's edge," and thus stated the difficulties of the contrary rule; "Non-navigable streams are usually narrow, and the lines of

riparian owners can be extended into them at right angles, without interference or confusion, and without serious injustice to anyone. It was therefore natural, when such streams were called for as boundaries, to hold that the real line between opposite shore owners was the thread of the current. The rights of the riparian proprietors in the bed of the stream, and in the stream itself, were thus clearly defined. But when this rule is attempted to be applied to lakes and ponds, practical difficulties are encountered. They have no current, and, being more or less circular, it would hardly be possible to run the boundary lines beyond the water's edge, so as to define the rights of shore owners in the beds. Beaver Lake is seven and a half miles east and west and less than five miles north and south. Extending the side and end lines into the lake, there being no current, when would they meet? This rule is applicable, if at all, whether there be one or more riparian proprietors. * * * It would be unfair and unjust to allow a party to claim and hold against this grantor the bed of a lake containing thousands of acres, solely on the ground that he had bought and paid for the small surrounding fractional tracts—the mere rim."

In *Clute* v. *Fisher*, 65 Mich., 48, the court held the grantee of land bordering upon a non-navigable lake did not stop at the water's edge, but that he might take so much of the bed of the lake as was required to fill out the section or quarter section of which he owned a fraction, and that his common law right was limited by the sectional lines of his survey. In that case such extension of lines absorbed the entire lake, but the court does not clearly indicate what should be done if the body of water was so large that the lines of the granted section or quarter section would not embrace the whole lake bottom.

In *Stoner* v. *Rice*, 121 Ind., 51, the court held the grant not limited by the water's edge, and the *Clute Case* is followed with the result of absorbing all the lake bed by the extension of sectional lines.

The court said: "It is contended that the riparian owner bordering on a non-navigable lake, like a river, takes to the thread or center of the lake. This rule is impracticable when applied to lakes. Suppose the lake to be round, or nearly so, with riparian owners, as there would be, on the north, south, east and west of it, this rule could not be applied. * * * Where the body of water is a running stream, being a narrow rivulet at its head and growing larger and widening until it enters into another stream still larger, or where it is a long, narrow body of water, there is no trouble in applying this doctrine; but where the body of water is surrounded by land, and is almost circular in form, covering a quarter or half section or more of land, with riparian owners on either side, we cannot say that the owners on the east and the west could take to the exclusion of those upon the north and south, nor *vice versa*. Nor would it do, as it seems to us, to apply a doctrine that would require the running of diagonal lines between the various owners,

each reaching to the center of the lake." The court also said that the section lines could not be passed when the lake is so large that the extension of those lines would not absorb it. To the same effect are *Hodger* v. *Williams*, 95 N. Carolina, 331; *Waterman* v. *Johnson*, 13 Pick., 261; *State* v. *Portsmouth Bank*, 106 Ind., 435; *West Roxbury* v. *Stoddard*, 7 Allen, 158; *Noyes* v. *Collins*, 26 L. R. A. (Iowa), 609. Many other cases could be cited.

The question was before this court in reference to a grant of land bounded on Lake Michigan, in *Seaman* v. *Smith*, 24 Ill., 521, in which it was said (page 525): "These great bodies of water having no currents like rivers and other running streams, cannot present the same reason why the boundary should be extended beyond the water's edge, where it is ordinarily found, that apply to running bodies of water Where such streams are called for as a boundary, the thread of the current is held to be the line from each side. Such a rule could not, for the want of a current, be adopted in this case. It would not be sanctioned either by analogy to the rule or by reason; and if the outer edge of the water be passed, owing to the approximation of these bodies to a circular shape, it would be found exceedingly difficult, if not impossible, to ascertain where the boundary should be fixed, or the shape it should assume."

In *Trustees of Schools* v. *Schroll*, 120 Ill., 509, it was said (p. 518): "It is equally well settled that grants of land bounded on streams or rivers above tide water carry the exclusive right and title of the grantee to the center of the stream, *usque ad filiam aquæ*, subject to the easement of navigation in streams navigable in fact, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the stream. * * * But an entirely different rule applies when land is conveyed bounded along or upon a natural lake or pond. In such case the grant extends only to the water's edge."

These principles, as enumerated in the two cases cited in this state, are based on the principles of the common law, as we understand it and as it has been held by courts of various states.

It is urged, however, that the decisions of the New England States are based on colonial ordinances of 1641 and 1647. The Massachusetts colony, by an ordinance of 1641, provided that great ponds containing more than ten acres of land should be free for fishing and fowling, and by the amendment thereto of 1646 towns were prohibited from granting away great ponds. All the New England states whose opinions hold as we do, were not, however, subject to the ordinances of the Massachusetts Bay colony.

The principle that the riparian owner takes to the center of the bed of a non-navigable lake is sustained in *Lembeck* v. *Nye*, 47 Ohio St., 336; *Smith* v. *City of Rochester*, 92 N. Y., 463; *Warren* v. *Chambers*, 25 Ark., 120; *Longway* v. *State*, 18 L. R. A. (Minn.), 670. Many other cases might be cited sustaining the same view. The same rule is held by the Supreme Court of the United States in *Hardin* v. *Jordan*, 140 U. S., 371.

From the fact that so few lakes existed in Great Britain on question of the right of the riparian proprietor to the bed of the lake was there claimed to be presented until 1878, when the case of *Bristow* v. *Cormican*, 3 App. Cas., 641, relating to Lough Neagh in the north of Ireland, was before the House of Lords. There the plaintiff sued the defendant in trespass for fishing in the lake, and deraigned title from the crown, by a grant in the time of Charles II, of all fishing in that body of water. It was held the crown had no right to make such grant in such waters, as against the rights of riparian owners or others. This decision of the high authority from which it originates is deserving of the greatest consideration. It is not of that controlling authority as to what is the common law which it would have been if made before the organization of our government. Nor do we believe this decision can be said to determine riparian rights as taking the bed of the lake. The large fresh-water lakes in and bordering this state present conditions wholly unprovided for by the common law of England, and the law of boundary as applied to rivers is inapplicable to such lakes. A principle applied to a large lake is a principle applicable to a smaller one. This principle applies to such as are meandered in the original survey. Where, however, such small lakes are not meandered, but are of a size that they are included within the corners of a survey, then a different condition exists, and they would be included in a grant of the land.

In the case of *Beckman* v. *Kreamer*, 43 Ill., 447, a small lake existed, and the riparian proprietor owned on both sides. A trespasser entered on the lake and seined for fish, disregarding the objections of the riparian owner. The riparian proprietor brought an action of trespass, and it was held he could recover. Whether the lake was meandered in the original survey or included within the corners of a subdivision is not shown. Neither does it appear whether it was a lake proper, or mere widening of a stream with a current therein. If the latter, or a lake not meandered and included within the corners of a survey, then the riparian proprietor took its bed.

These cases cited are the only decisions with reference to boundary or riparian ownership of lakes which have heretofore been before this court, and there is no conflict therein, and no reason exists why we should change the rule therein announced. On the contrary, aside from the principle of *stare decisis*, we should adhere to that rule. The policy of the state in recent years has been to stock its waters, both lakes and streams, with fish, as a means of giving cheap and valuable food to her citizens, and with this purpose regular appropriations and expenditures are made. If we depart from the reasonable rule we have established, the small non-navigable lakes would become the private waters of riparian owners pertenant to their lands, with exclusive rights thereon as to boating, fishing and the like, from which the body of the people would be excluded—a

principle inconsistent with and not suited to the condition of our people nor called for as a rule of law.

The Supreme Court of the United States, by a divided court, in *Hardin* v. *Jordan*, *supra*, and *Mitchell* v. *Smale*, *supra*, has sought to apply the same rule to lakes as to streams, and follows *Bristow* v. *Cormican*, *supra*, as announcing such to be the common law rule, and declined to recognize *Trustees of Schools, etc.*, v. *Schroll*, *supra*, as the law of Illinois. We yet, notwithstanding the high respect we owe that august tribunal, hold the common law to be as we have heretofore announced it—a view taken in the opinion of the dissenting minority in those two cases and with which the views of many able courts in different states concur.

It now becomes necessary to determine whether the lake-bed passed to the state under the swamp land act. Prior to 1850 there were many lakes similar to those in this record referred to, in many of the states, which induced the passage of the Swamp Land act, with the amendments. The decisions of the various state courts on the construction of that act have not been accordant. In the Supreme Court of the United States, in *Railroad Co.* v. *Smith*, 9 Wall., 95, it was held the right of the state to swamp and overflowed lands did not depend on the action of the Secretary of the Interior in making lists of them, and oral evidence in a court of justice showing lands to be swamp lands could be received, which would exclude them from passing under a grant from which they were excepted. In *French* v. *Fyan*, 93 U. S., 169, it was held by the second section of that act the power and duty devolved upon the Secretary of the Interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of the description granted by the act, and made his office the tribunal whose decision was to control that question. In *Ehrhardt* v. *Hogaboom*, 115 U. S., 67, parol evidence was held inadmissible to show certain land patented under that act was not swamp land. In *Martin* v. *Marks*, 97 U S., 345, it was held it would probably have been necessary, to support a title under that act, to prove the list was on file with the commissioner. The great weight of authority is, the grant made by that act operated *in præsenti*. From a consideration of the opinions of that court it appears, that whilst the act operated as a grant *in præsenti*, it was a question for the decision of the Secretary of the Interior whether a particular tract was swamp land, and his decision, when once made, was final and conclusive, and it is sufficient if lands have been selected as within the act, and when so selected the title relates to the passage of the act. If the secretary has not designated any tract as swamp lands within a state, and neglects and refuses to act, and has not decided to the contrary, then it may be shown by parol, in behalf of the state or one claiming thereunder, as against wrongful claimants, that a particular tract is of the character included within the act. There are no means by which the Secretary

of the Interior may be compelled to act. *French* v. *Fyan*, *supra*; *Gaines* v. *Thompson*, 7 Wall., 347; *Secy.* v. *McGarrahan*, 9 Wall., 298; *Litchfield* v. *The Register and Receiver*, 9 Wall., 575.

After the survey of 1874 the record shows that at a hearing held under the supervision of the General Land Office of the Department of the Interior about the time of the survey of 1874, the State of Illinois and the County of Cook (the swamp lands in Illinois having been conveyed by the state to the counties, by act of June 22, 1852) claimed these lands in controversy as swamp lands, but this claim was rejected and the survey of 1874 approved, upon appeal to the Secretary of the Interior. Since that determination of that question these lands so conveyed have been taxed for state and county purposes. It appears from the evidence the hearing by the officers of the Land Department was had on questions of fact. The determinations of these officers are conclusive on the parties to such proceeding except in a direct proceeding. (*Johnson* v. *Towsley*, 13 Wall., 72; *Warren* v. *Van Brant*, 19 Wall., 746; *Shepley* v. *Cowan*, 91 U. S., 230; *Marquez* v. *Frisbie*, 101 U. S., 473; *Quinby* v. *Conlon*, 104 U. S., 420; *Smith* v. *Smelting Co.*, 106 U. S., 447; *Cragen* v. *Powell*, 128 U. S., 691.) In the latter case it was also held, when a survey had been made and approved by the government, with plats, maps, field notes and certificates filed, and such lands so surveyed are sold, the courts have power to protect the private rights of a party who has purchased in good faith from the government, against the interferences or appropriations of subsequent corrective re-surveys made by the Land Office. To the same effect is *Moore* v. *Robbins*, 96 U. S., 530.

From these cases it would follow the County of Cook has no claim on the lands to be in any manner determined in this case, it not being a party, and not having sought, by a direct proceeding, to determine the correctness of that ruling, and no lists made by the secretary of the land as swamp lands. The question, therefore, as to the private rights must be determined by settling the rights of the parties under the patents issued on the two surveys.

The evidence shows the survey of 1874 was made, in the greater part, as a survey of land covered with water, but slight changes existing then from what existed at the time of the original survey. By that survey an attempt was made to take possession of and survey and sell riparian rights in land where no claim was made of fraud or mistake in the original survey of 1834 and 1835. No such right existed in the Commissioner of the General Land Office. Riparian proprietorship is a property right of value, and to it are attached rights and privileges conferred by law, of which the owner can not be deprived by an illegal proceeding. In this case such rights must be resolved by the law of Illinois as to land bounded on a meandered lake. In *Trustees of Schools* v. *Schroll* and *Seaman* v. *Smith*, *supra*, we held the riparian owner took to the water's edge. It was a determination of a question of property rights. We applied the same principle to lakes so meandered, re-

gardless of the question whether or not they were navigable. *Seaman* v. *Smith* is in line with the uniform current of decisions as to navigable lakes. The Schroll case, as we have seen, is abundantly sustained by authority. We are asked to overrule the latter case and hold the grant to the riparian owner conveys the bed of a non-navigable lake and makes its waters mere private waters. We decline to do so. By such holding, so long as such meandered lakes exist, over their waters, and bed when covered with water, the state exercises control, and holds the same in trust for all the people, who alike have benefit thereof in fishing, boating, and the like.

By the adoption of this principle, which applies alike to all meandered lakes, streams and rivers, there is no conflict with that applying to the sea, and littoral proprietors and riparian owners alike have all the benefits and rights of such ownership and take accretions to their lands. (*Chicago Dock and Canal Co.* v. *Kinzie*, 93 Ill., 415.) Whether we apply the term "accretion" to the slow, gradual, imperceptible formation of land on streams or lakes by the action of the current of the one or the recession of the waters or waves of the other, it is pertinent to the land alike and an accretion thereto. This doctrine of accretion has not, however, been applied to reliction, using the term in its best and strictest sense, for in such case the new land, if considerable and suddenly or perceptibly formed, in the case of lakes or the sea and tidal streams, belongs to the state; and in case of streams or rivers, as we have already stated, the center of the old channel remains the boundary between the riparian owners. The survey of 1874 was unauthorized, and no title by patents issued thereunder conveyed the bed of the lake. Neither did the grant of the fractional tracts, as made under the survey of 1834 and 1835, convey the bed of the lake, but gave riparian rights. Where accretions come to such riparian proprietors they shall take to the water's edge, and follow the recession of waters to their edge. Their lines and bounds are thus determined and are certain. This rule recognizes the riparian proprietors' rights to the fullest extent. The value of his riparian rights are preserved to him. If, as in many such lakes, there is much depth of water on one side and very shallow on the other, and in process of time recession of waters on the shallow side passes beyond the lake's center, the owner on that side still goes to the water's edge, and the proprietor on the other side should not come in between the lake and such proprietor after the waters have receded beyond the center. Where there is depth of water the lake still exists, and one proprietor is not deprived of the benefits of his riparian rights.

It is urged with much vigor that the question of the effect of patents to lands issued by the United States is peculiarly within the province of her courts for construction. It is of a higher importance that the law of this state shall, so far as it is local to the state and its citizens, and to its and their interests, be determined and controlled by the courts of the state. When the law of Illinois shall be declared and recognized, when it is within the province of

her courts to determine it, a recognition of it would enable this state to control such bodies of water within her borders for the benefit of the people and preserve to the riparian proprietors their rights as such owners.

On the question of limitation, sought to be asserted under color of title, we will not attempt to analyze and discuss the mass of conflicting evidence appearing in this record. We concur with the learned chancellor in the view taken by him of actual possession. In no case was it of that character that complied with the requirements of the law. There was such interruption of the running of the statute that no title became settled. In many of the tax deeds set up in the cross-petitions the defects in notice, absence of judgment and precepts, etc., caused no title to be conveyed. The rights acquired by the South Chicago and Southern Railroad Company being from those claiming under the survey of 1874 must fail with those claiming thereunder.

J. Ensign Fuller seeks to set up tax title by four tax deeds.

(a) One of these deeds is said to have been to D. G. Hamilton, September th, 1875, under sale April 6th, 1873, of W. ½ N. W. ¼ S. E. ¼ of section 19.

(b) The next tax deed so set up is also said to have been to Hamilton, dated March 5th, 1877, of the undivided 20 acres in the N. E. ¼ of the S. E. ¼ of section 19.

(c) The third tax deed set up by Fuller is one of May 31st, 1877, to P. D. Hamilton, which again is for the W. ½ of the N. W. ¼ of the S. E. ¼ of section 19.

(d) The fourth tax deed set up by said Fuller in his answer is one of July 23rd, 1880, to Hamilton, of the N. E. ¼ of the S. E. ¼ of section 19.

Nothing is offered to support deeds a and c—neither judgment or precept. Deed b was for special assessment of the South Park Commissioners, neither a judgment nor notice to owners is shown. Deed d was based on a notice of application for deed describing the lands in section 9 instead of 19. The cross-bill of Fuller also avers ownership of lots 2 and 3 of the southeast quarter of section 19, and the southeast fractional quarter of the east fraction of the S. W. fractional quarter of the section. The last three tracts, as well as some of those to which it is sought to assert tax title, are described under the survey of 1874. The answer of F. F. and John I. Bennett, filed September 12th, 1889, asserts a claim, one-half by John I. Bennett, one-fourth by Fred F. Bennett, to fractional northeast quarter of section 30, by virtue of sale for fourth installment of South Park assessment to R. W. Bridge, such sale having been made November 9th, 1876.

The insufficiency of the tax deed first given under this sale results because it bears date August 1st, 1879, and recites the sale was made November 9th, 1879, and the answer shows an attempt by the county clerk to give a new deed, dated March 8th, 1882, recorded March 13th, 1882. This attempt to correct the error in

the first deed would be ineffective. The sale became void under section 225, chapter 120, Revised Statutes, because a proper deed was not taken out within one year after the time for redemption expired. (*Chappell* v. *Spire*, 106 Ill., 472; *Altes* v. *Hinkler*, 36 Ill., 265; Burnt Records Act, Sec. 23.) In addition to this, the description of land sold and as assessed is indefinite and uncertain. The claim of tax title as to fractional section 29—7.37 acres—under tax deed issued to R. W. Bridge, dated August, 1877, No. 335, based on sale December 3rd, 1874, for the second installment South Park assessment, and as to the southwest fractional one-half section 20, 4.53 acres, under tax deed dated August 1st, 1879, No. K, 568, running to the South Park Commissioners, based on a sale November 9th, 1876, for fourth installment South Park assessment, can not be sustained, as the judgment on which the sale was based and deed issued included excessive costs. *Coombs* v. *Gaff*, 127 Ill., 431.

The tax titles sought to be set up in the various cross-petitions not being valid, it was not error to dismiss all the cross-petitions on that question. Neither was there continuous and exclusive possession under such deeds as color of title. The answers putting in issue the right of Shedd and Hardin to the bed of the lake, it follows the decree of the Circuit Court finding they, by *mesne* conveyances, became the owners of the lake bed, was erroneous.

The decree is in part affirmed and in part reversed, and the cause remanded for further proceedings in conformity with this opinion. Appellants Charles E. Rand, Franklin A. Cleveland, Elizabeth Thomas and the South Chicago and Southern Railroad Company are each ordered to pay one-eighteenth (1/18) of the costs of this court. Appellants J. Ensign Fuller, Conrad N. Jordan, John I. Bennett and Frank I. Bennett are jointly ordered to pay two-ninths of the cost of this court. Charles B. Shedd and Gertrude H. Hardin are each ordered to pay five-eighteenths (5/18) of the cost of this court.

In part reversed.

APPENDIX B.

II. *Opinion of Supreme Court of Illinois, filed December 21, 1898.*

AT A SUPREME COURT, begun and held at Springfield, on Tuesday, the sixth day of December, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois·

Present—JOSEPH N. CARTER, Chief Justice.

ALFRED M. CRAIG, Justice, BENJAMIN D. MAGRUDER, Justice,
JACOB W. WILKIN, Justice, JESS E J. PHILLIPS, Justice,
JAMES H. CARTWRIGHT, Justice, CARROLL C. BOGGS, Justice.
EDWARD C. AKIN, Attorney General.
EDWARD A. BAXTER, Sheriff.
Attest: CHRISTOPHER MAMER, Clerk.

BE IT REMEMBERED, That afterwards, to-wit, on the 21st day of December, 1898, the opinion of the court was filed in the words and figures following, to-wit:

GERTRUDE H. HARDIN, *et al.*
No. 76. *vs.*
CHARLES B. SHEDD.
FRANKLIN A. CLEVELAND, *et al.* } Appeal from Cook.
vs.
CHARLES B. SHEDD.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a consolidation of several bills in equity under the Burnt Records Act, filed in the Circuit Court of Cook County. From a decree rendered in that court an appeal was prosecuted to this, and the decree below in part affirmed and in part reversed, the cause being remanded for further proceedings in conformity with the opinion filed therein. For a statement of the pleadings and evidence in the case and the opinion then rendered, see *Fuller* v. *Shedd*, 161 Ill., 462.

Upon the cause coming on to be heard after the remandment to the Circuit Court, defendant and cross-complainant Gertrude H. Hardin filed her motion in writing for leave to introduce further testimony. This motion set up that since the entry of the original decree a trial had been had in a suit in ejectment by her against one Conrad N. Jordan, in the United States Circuit Court for the Northern District of Illinois, in which it was found by that court that she was seized in fee simple of certain lands claimed by her in her cross-petition in this cause, and was entitled to recover such lands to the center of Wolf Lake. The motion also suggested that the testimony taken at the original hearing, before appeal to this court, had not been directed especially to the question of the extent of accretions or relictions, but more especially pertained to the questions raised by persons claiming under the survey of 1874,

which this court held to be void, and offered to show by surveys and field notes the nature of the accretions and relictions, and that the lake or lakes have but little likelihood of permanence unless artificially sustained or protected. Appellants Cleveland and Rushmore at the same time filed a petition asking leave to file a supplemental answer. The petition recited that since the trial of the cause which resulted in the decree of August 10, 1892, the waters of Hyde Lake had, because of the deepening and widening of the Calumet River, all disappeared, and the land formerly covered by that lake was now dry ground.

The chancellor denied the motion of Gertrude H. Hardin and also the petitions of Cleveland and Rushmore. Thereupon a decree was entered, which, among other things, recited that "the recession was such that between the meandered lines and the water there was uncovered, and the greater part of the year was dry land around the lake, a strip twenty to twenty-five rods wide, and the marshy depression between the two ridges of land above described has become permanent dry land, the width thereof at the date of the former decree varying from at least thirty-six rods to seventy rods; that said permanent land thus accruing became attached to the said ridges of land as accretions and by reason of such recessions of the waters." Thereupon it was "decreed that said Charles B. Shedd should have and recover from each, all and every person and persons in possession of or claiming any right, title or interest in or to the same, on to any part thereof, the possession of the fractional southwest quarter of fractional section 20, and the fractional section 29, all in township 37, north of range 15, east of the third principal meridian, and the lands particularly described as follows, to wit: Beginning at the northeast corner of said fractional southwest quarter of said fractional section 20, township 37 north, range 15, east of the third principal meridian; running thence south along the east line of said southwest fractional quarter of said fractional section 20 (and the extension thereof to the south) to the open waters of Wolf Lake; thence along with the open waters of Wolf Lake in a southerly or southwesterly direction to the south line (extended to the east) of the said fractional section 29; thence west along said line as extended, and said south line of said section 29, to the north and south section line between sections 29 and 30 of said township and range; thence north along the line between said sections 29 and 30, and its extension to the north to a point identical with the northwest corner of the southwest quarter of said section 29, if said section were fully squared out and all its lines extended; thence from said point northwesterly to the waters of Hyde Lake, along a line drawn at an angle of forty degrees with a line drawn due east and west through or at said point; thence along with the waters of Hyde Lake in a northerly or northeasterly direction to the center east and west line (extended to the west) of section 20; thence east along said line as extended and along said line to the place of beginning, together with all and

singular the riparian rights and privileges and benefits incident to the position and location of said described tract or tracts of land, with reference to the lakes as aforesaid," etc.

The first question presented for our decision is, whether the court below erred in refusing to open up a case for further pleadings and proofs. Adhering, as we do, to the conclusion reached upon the former appeal as to the invalidity of the survey of 1874, in must follow that the court properly refused the petition of appellants Cleveland and Rushmore. The validity of the survey under which they claimed depended, not upon the conditions at the time leave was asked to file an amended answer, but when the original survey was made. Whether the land formerly covered by the waters of Hyde Lake is now dry or still covered by water can make no difference to these appellants, so long as they are able to show no title to the shore.

We are also of the opinion that the motion of Mrs. Hardin for leave to introduce additional evidence was properly refused. The only objection to that ruling worthy of particular attention is, that the offered proof tended to show relictions and accretions in Hyde Lake since the case was originally tried. The evidence on the former hearing showed, and we so found on the former appeal, that from the meander line around the lake to the water's edge there was a recession of about twenty-five rods and that the depression between the two ridges was permanent dry land, our decision then being that the riparian owners took to the water's edge, their rights to accretions and relictions following the recession of the water. Hence to have admitted the offered evidence would have been to open up for re-trial a question already tried and determined, which, under the uniform decisions of this court, is not permissible. *Wadhams* v. *Gay*, 83 Ill., 250; *Hough* v. *Harvey*, 84 *Id.*, 308; *Newberry* v. *Blatchford*, 106 *Id.*, 584; *Washburn & Moen Manf. Co.* v. *Chicago Galvanized Wire Fence Co.*, 119 *Id.*, 30; *Sanders* v. *Peck*, 131 *Id.*, 407; *West* v. *Douglas*, 145 *Id.*, 164.

On the question of the rights of riparian owners to accretions formed by the recession of waters of lakes like these, we do not consider it necessary to add anything to what we said on the former appeal. The able and earnest arguments of counsel to the contrary have received careful consideration, but have failed to convince us that the rule heretofore laid down is not the more practicable and just one.

Many objections are urged against the decree below as fixing the boundary lines of appellee Shedd. Whether the decree gives him too much or too little of the land is not material in the decision of this case, there being no showing that the rights of appellants are thereby prejudiced. As to owners or claimants, if any, who have not had their day in court, the decree will, of course, have no binding force.

It is contended that, being the owner of the land abutting upon Hyde Lake on the west, appellant Hardin is entitled to all accre-

tions formed on her shore line facing the east and directly in front of the open water between the two lakes at the time of the survey in 1834. This contention is, practically, that there is but one lake instead of two. We are unable to discover any reasonable theory upon which this claim can be sustained. Under the rule laid down in our former decision Mrs. Hardin can have no interest in the dry land formed between the southwest fractional section 20 and the southwest fractional section 29. At the time of the former hearing the waters had not receded to any considerable extent from the shore line. No matter how deep or shallow the waters were, she must claim whatever right she has by reason of accretions to her lands. We cannot see how the ridge of dry land between the fractional quarter section spoken of can, under these circumstances, be treated as an accretion to lands on the west bank of the lake. To do so would be, in effect, to hold that the entire lake bed is an accretion to such land.

We are also of the opinion that the objection to the decree on the ground that it does not fairly divide the accretions between fractional section 29 and the west fraction of the southeast fractional section 30 must be overruled. The plats, with distances, in evidence, show that the division in equitable and just. The decree proceeds upon the theory the ridge formed in a northerly direction from these fractional pieces of land as an accretion thereto, and it seeks to make an equitable partition thereof between the owners of such fraction. We are unable to see wherein the division is unfair to the parties.

On the whole record the decree of the Circuit Court appears to be in conformity with the directions given in our former opinion, and it will be, accordingly, affirmed.

Decree affirmed.

No. 268.

Brf. of Dent for

Filed Jan. 13, 1902.

Office Supreme Court U. S.
FILED
JAN 13 1902
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 268.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY,
PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Illinois.

ARGUMENT FOR THE PLAINTIFFS IN ERROR.

THOMAS DENT,
FOR THE PLAINTIFFS IN ERROR.

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TABULAR NOTICE.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 268.

GERTRUDE H. HARDIN and the COOK COUNTY CANAL AND DOCK COMPANY,
Plaintiffs in Error,
vs.
CHARLES B. SHEDD,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

ARGUMENT for the PLAINTIFFS in ERROR.

ABSTRACT OR STATEMENT OF FACTS.

The writ of error in this case is brought for the review of a judgment of the Supreme Court of Illinois, whereby the plaintiffs in error were denied the rights which were set up by them under patents from the United States for certain lands which, when surveyed and sold, bordered upon a non-navigable lake then in the vicinity of Chicago.

The lake, or what remains of it, is now within the limits of that city, except as to that part of the same which was in the State of Indiana.

A claim of proprietorship in the submerged lands by virtue of patents from the United States was denied and overruled by the Supreme Court of the state as inconsistent with the policy of the state concerning lakes meandered in the public surveys.

Map No. 1 herein, representing in outline the fractional township in Illinois embracing the part of the lake which was within that state, is here given, as representing the official plat, but on a reduced scale, and omitting some details.

Entry or purchase from the United States of a part of these lands was made by the late John Holbrook, father of plaintiff in error Gertrude H. Hardin, on the 24th day of December, 1838. (Record, 246.) Patent for the same from the United States was issued to said Holbrook May 20, 1841. (Record, 245.)

For another part of such lands the patent from the United States was issued to William B. Egan on the 1st of August, 1853. (Record, 249.)

The plaintiffs in error traced title under said patents.

The lands covered by the entry by and patent to said Holbrook were in such patent described as follows:

> "The south-east fractional quarter and the east fraction of the south-west fractional quarter of Section nineteen (19), the north-east fractional quarter and the east fraction of the south-east fractional quarter of Section thirty (30), in Township thirty-seven (37) north, Range fifteen (15) east, in the district of lands subject to sale at Chicago, Illinois, containing one hundred and fifty acres and ninety-eight hundredths of an acre, according to the official plat of the survey of said lands returned to the general land office by the Surveyor General."

Three of the fractional subdivisions described in that patent were on the lake. But the other, namely, the east fraction of the south-west fractional quarter of Section 19, being the westerly tract, had its western border on what was known at the time of the survey as the "Little Kalamick River," now known as Calumet River.

MAP No. 1.

LAKE MICHIGAN
OLD INDIAN BOUNDARY LINE
LITTLE KALAMAZOO RIVER
LITTLE
NAVIGABLE LAKE
C. & M. R. R.
6
5
7
8
18
17
19
20
30
29
31
32
A. 87.20
A. 126.07
A. 144.74
A. 160
A. 79.32
A. 38.09
A. 119.50
A. 139.53
A. 96.97
A. 121.42
A. 156.47
A. 97.71
A. 113.60
A. 96.60
C. 26174
A. 111.04
A. 79.11
A. 117.67
A. 161.20
A. 120.72
A. 112.39
A. 7.90
A. 116.86
A. 78.21

The three tracts, so entered by John Holbrook, which bordered on the lake, were the south-east fractional quarter of Section 19 (79.11 acres), the north-east fractional quarter of Section 30 (28.74 acres), and the east fraction of the south-east fractional quarter of Section 30 (2.04 acres), the specified acreage being as per the government plat.

The other tract, a part of which was held by plaintiff in error Gertrude H. Hardin, under the patent to William B. Egan, was described in said patent as follows:

> "The west fraction of the south-east quarter (west of lake) of Section thirty (30), in Township thirty-seven (37), of Range fifteen (15), in the district of lands subject to sale at Chicago, Illinois, containing twenty-five acres and nine-hundredths of an acre, according to the official plat of the survey of said lands returned to the general land office by the Surveyor General." (Record, 249.)

The two tracts of defendant in error, Charles B. Shedd, through title to which the judgment of the State Court gives him a large part of the former lake, were the south-west fractional quarter of Section twenty (20), in said Township and Range (4.53 acres as per the government plat), and Fractional Section twenty-nine (29) in the same township and range (7.37 acres, according to said plat), the former tract having been patented to Horatio B. DeWitt, March 1, 1850 (Record, 57-8), under an entry made at the land office in Chicago July 10, 1848 (Record, 57), and the latter tract having been patented to Stephen A. Douglas, October 1, 1855 (Record, 60), under an entry at said land office May 8, 1855. (Record, 59.)

For convenience of reference a photo-lithographic copy of a part of the official plat of the government sur-

vey of the sections in respect to parts of which there is controversy in this case is here shown (marked Map No. 2).

But in looking at this map it should be borne in mind that the lines crossing the lake, and designed to show land subdivisions within the State of Illinois, were made under a survey which was ordered by the Commissioner of the General Land Office in 1874, after the tracts or fractions bordering on the lake had been sold; which survey has been held by this court, and also by the State Court, to have been unauthorized and void.

It will be noted, also, that such survey of 1874 was, according to the official designation, a survey of "Wolf Lake," then so called; the former designation of "Navigable Lake," however, remaining on the plat.

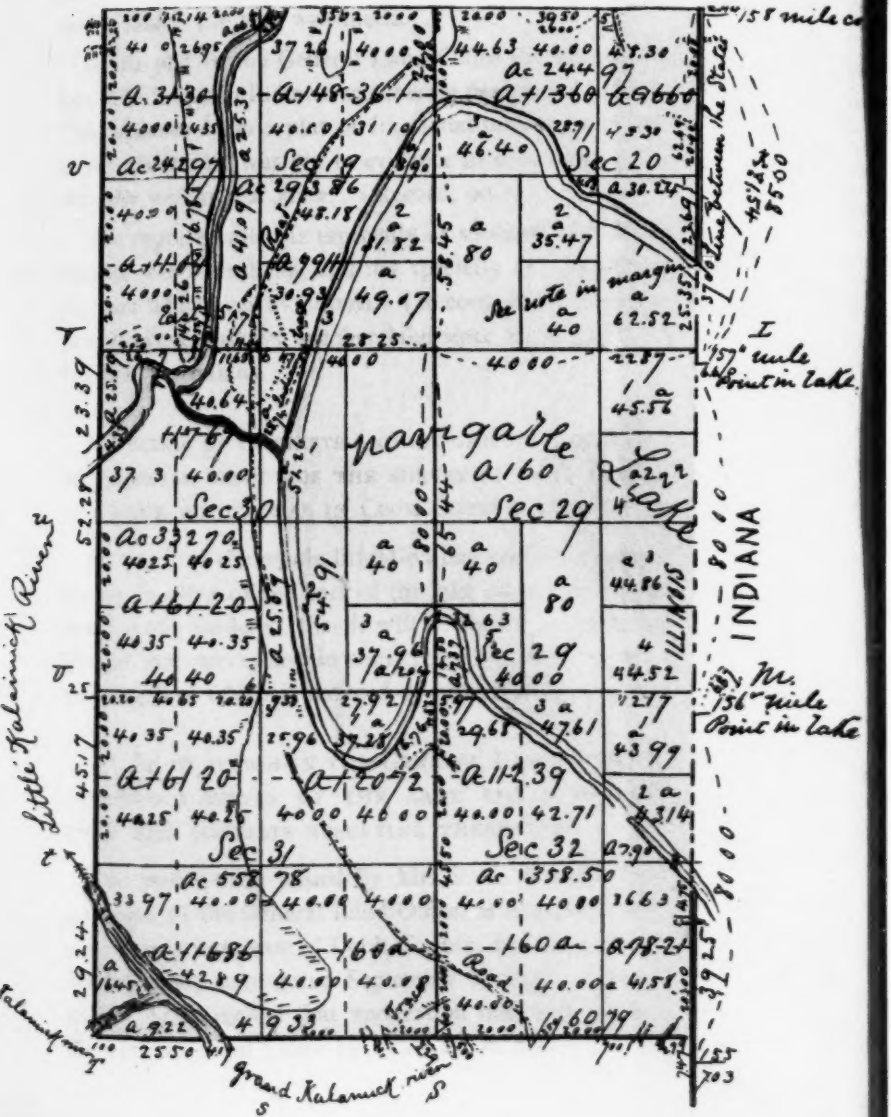
It is here meant that the name of Wolf Lake was then used in the General Land Office and local Land Office to designate the lake.

The survey but protracted the lines across or within the lake.

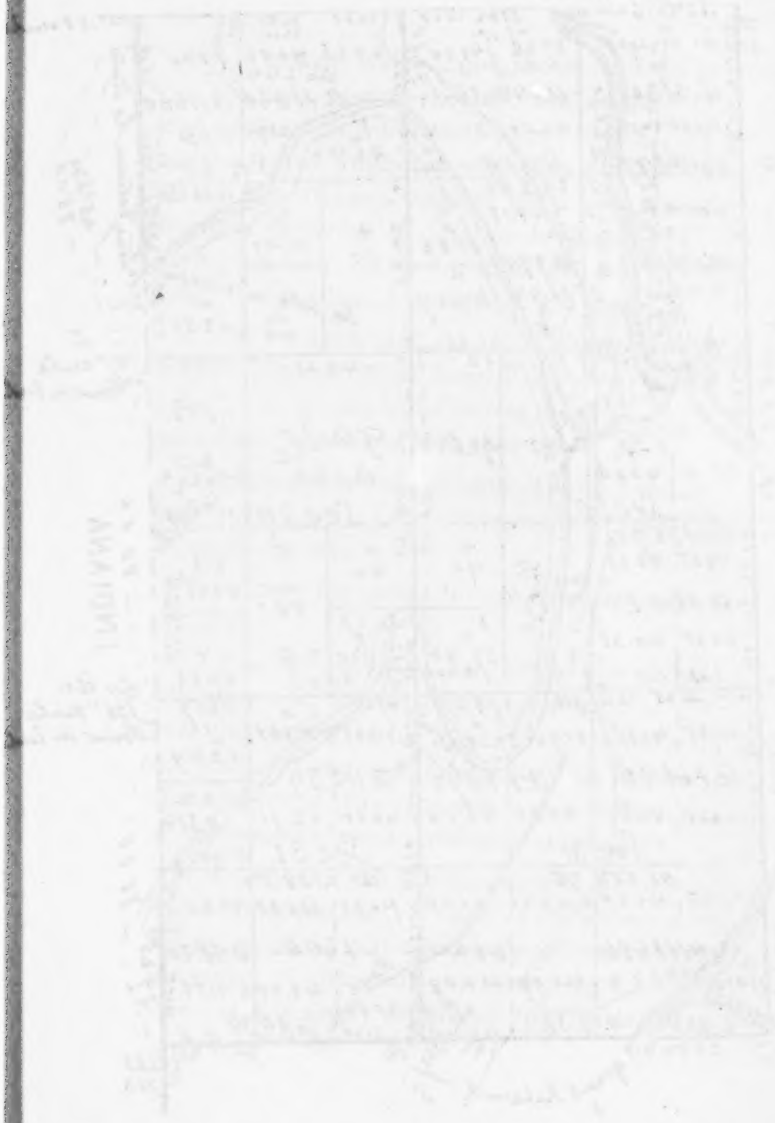
Such survey also accepted the official plat of the earlier survey, to wit: that of 1834-5, as correct, so far as it gave the outlines of the lake. (See "Jordan's Exhibit A," Record, 106-7; said exhibit showing the official plat of the survey of 1834-5, as well as that of 1874, as noted in the memoranda and certificates on the plat.)

It is perhaps much like repetition to say that neither in the official plat, as first made, of the survey of 1834-5, nor in the official plat as made to represent additionally the survey of 1874, was any special name given to the lake. It was simply designated "Navigable Lake."

MAP No. 2.


Sec 19
Sec 20
Sec 30
Sec 29
Sec 31
Sec 32
part gable
a160
Lake
INDIANA
ILLINOIS
Little Kalamazoo River
Grand Kalamazoo River
Road
160 a
160 a
160 a
160 a
1/4 mile
Point in lake
1/4 mile
Point in lake
1/8 mile
Line between No States

7454



But such designation is abundantly shown to have been erroneous, whatever may have been the conception under which the plat was made.

In the plat in the General Land Office the part of the lake which was in Indiana was merely designated "Lake." This appears from a plat of fractional townships in that state; which plat was put in evidence to show the part of the lake within that state. (Record, 90.)

The representation is especially of so much only of the lake as was in Indiana, and not specially or relatively of the part which was in Illinois. (Record, *ib.*) The same plat, however, shows another lake since known as Lake George, in Indiana.

A REVIEW OF CONTESTS AND LITIGATION WHICH WAS THE SPECIAL RESULT OF THE SURVEY OF THAT PART OF THE LAKE WHICH WAS IN COOK COUNTY, ILLINOIS.

So much of the whole litigation has resulted from the survey in 1874 of the part of the lake on which the patented lands bordered, that it will be timely to speak further of that survey,and in some respects of the course of the litigation which it induced or necessitated.

1. AS TO ACTION IN THE GENERAL LAND OFFICE IN ORDERING A SURVEY OF THE LAKE BED IN 1874 AND UPON THE CONTESTS RESULTING THEREFROM.

The instructions issued by Mr. S. S. Burdett, Commissioner of the General Land Office, to Alexander Wolcott, county surveyor of Cook County, for the survey of the lake bed, were dated September 8, 1874. (Record, 388.) They recited that application had been made to the General Land Office by Franklin A. Cleaveland and

others for the extension of the lines of public surveys over "meandered lake," situated in Sections 19, 20, 28, 30, 31 and 32, Township 37 north, Range 15 east, which, according to sworn testimony, had been reclaimed. That the land forming the bed thereof was shown to be fit for agricultural purposes. That $80 had been deposited by the parties interested in the survey to cover the expense of the survey of so much of said sections as was dry land admitting of the running, measuring and marking of the lines of public surveys. That the applicants had named said Wolcott as a proper person for the work, and submitted a proposal by him as to the amount he would charge for the survey. That the commissioner had consented to appoint said Wolcott a United States deputy surveyor for the execution of the work.

Mr. Wolcott was directed, if he accepted the appointment, to identify the meander corners of the original survey of so much of the lake as fell within the State of Illinois; and if the lines along the state boundary were surveyable, he was to extend the line between the States of Indiana and Illinois by establishing the proper mile-post at a point eighty chains north of the 155-mile corner, which he should identify. That he would then prolong the lines interrupted by the lake and cross the same, or so far as the dry land admitted of the establishment of permanent corner boundaries according to the manual of surveying instructions. That each quarter section should have three corners established, and permanently marked and witnessed; this being necessary in order to enable parties to acquire title and procure a patent. It was to be the aim of the surveyor to complete legal subdivisions of the original survey. An extract was furnished Mr. Wolcott of the field notes of the former sur-

veyors; also field books and field note paper on which he was to make returns of the survey. He was to furnish a diagram containing the extent of the reclaimed lands, and was to state under official oath, from such sources of information as might be at his command, whether then at or any former time this body of water was, or actually had been, used as a highway of commerce, or had ever been susceptible of such use.

The lands surveyed in 1874 were found, said the Commissioner of the General Land Office, to

> "constitute the bed of a lake which is known as Wolf Lake, in Cook County, Illinois, shown by the survey of the township in 1835 as a navigable lake." (Record, 91.)

The commissioner declared that:

> "The waters having receded or evaporated, application for the survey of the body of land so brought into existence was made under circular issued from this office July 13, 1874."

Survey under such circular and under the special instructions to Alexander Wolcott, a United States deputy surveyor, was made, and was approved December 31, 1874.

On the 9th of January, 1875, a copy of a plat of this survey was sent to the district officers at Springfield, Illinois, with instructions to notify all claimants for the lands of a day set for hearing testimony regarding claims or contests over the property so surveyed. After such hearing the officers of the Springfield Land Office were to transmit all the proceedings, with their joint opinion thereon, to the General Land Office.

The report of Commissioner Williamson, of the General Land Office, set out in the Record (see pp. 91-106

of Record), proceeds to give an account of a hearing which was had in the Land Office in Springfield, Illinois, February 8, 1875, and succeeding days. The report shows, among other things:

That the plat of the survey of the township was undoubtedly filed in the District Land Office prior to June, 1836; entries of lands thereunder having been made at that time.

That the Illinois Central Railroad Company claimed, as grantee of the State of Illinois, the lands in Sections 20 and 32 under the Act of Congress approved September 20, 1850, granting lands to the State of Illinois to aid in the construction of a railroad from Chicago to Mobile (9 Stat., 466); those sections being within the six-mile limits of that grant, as were also, in fact, all the lands in dispute.

That the State of Illinois claimed for itself the lands in Sections 20, 30 and 32, under the Swamp Lands Act of September 28, 1850 (9 Stat. at L., 519).

That the County of Cook claimed as grantee of the State of Illinois the lands in Sections 19, 29 and 31 under said Swamp Lands Act.

That meanders of what was termed a "Navigable Lake" covering the lands in controversy were surveyed in 1834 and 1835, and by the plat constructed from that survey the officers of the United States had so far been governed in disposing of the lands in the township. That in connection with the claim under the Swamp Lands Grant the testimony was that this land was to a great extent covered with water so late as 1850.

That the tenor of all the evidence was to the effect that the greater part, if not all, of the lands came into exist-

ence some time subsequent to 1850, and prior to the survey of 1874 as a "lake bed," from which, by evaporation or other causes, natural or artificial, the waters had permanently receded, leaving within the unsurveyed area dry land fit in ordinary seasons, for agricultural purposes.

That the survey of 1874 was of the bed of the lake, the lands in which had come into existence subsequent to the original survey.

That it being held that the land was not in existence at the date of the grant under which the Illinois Central Railroad Company claimed, the grant did not attach to it on the subsequent formation or appearance of the land.

That on transmitting the claims and testimony the district officers at Springfield forwarded their joint opinion thereon, which opinion was adverse to the claims of the Illinois Central Railroad Company, the County of Cook, as grantee of the state, and the riparian claimants, these including Gertrude H. Hardin and Horatio B. DeWitt aforesaid. But that such opinion was in favor of certain of the pre-emption and homestead claimants, occupying lots or parcels of the original lake bed surveyed in 1874 as aforesaid.

Proceeding to review the opinion of the district officers at Springfield, the Commissioner, by his said report, affirmed, in the main, the conclusions which they had advised or adopted; thus rejecting the claims of the Illinois Central Railroad Company, the State of Illinois, and the County of Cook, and likewise rejecting, upon the preference given pre-emptioners and homesteaders, the claims of Gertrude H. Hardin and Horatio B. DeWitt. The last named conclusion followed, as a matter of

course, upon the allowing of the pre-emption claims of Andrew Farrand, Alice A. Condit, Solomon Field, John E. Curtis, Chester B. Rushmore and Franklin A. Cleaveland, among others. (Record, 105, 106.)

In brief, the decision of the Commissioner of the General Land Office sustained the survey of 1874, making subdivision of the lake bed.

If we should follow the history as shown by various public documents, it would be seen that the decision was affirmed by Mr. Secretary Schurz, of the Department of the Interior, May 4, 1880, and that Secretary Bell, of the same department, on the 16th of May, 1881, refused a rehearing to Mrs. Gertrude H. Hardin, because she did not appeal from the order of Commissioner Burdett, of December 12, 1874, approving the survey by Alexander Wolcott of the lake bed. Some of the facts appear in *Hardin* v. *Jordan,* 140 U. S., 371.

However, the orders in the General Land Office, and in the Department of the Interior, after the said report or decision of February 12, 1878, are referred to here only incidentally, as having led on to the seeking by the patentees under the survey of 1834-5 of a remedy in the Courts, to be relieved from the burden cast upon them by the General Land Office in ordering and permitting the survey of the lake bed in 1874, and sustaining the pre-emption claims under such survey of the lake bed.

2. As to some branches of the litigation, shown or indicated by the record, resulting from the claims upon the lake bed lands under the survey of the lake bed, in Illinois, under Commissioner Burdett's circular of July 13, 1874.

With a desire to procure relief from the adverse claims set up under such second survey, various ejectment suits were brought in one of the State Courts of Illinois by Gertrude H. Hardin, one of the plaintiffs in error. (Record, 40.) Also an ejectment suit was brought by Charles H. Mitchell, claiming under the first survey. Such ejectment suits were by the defendants therein removed to the United States Circuit Court for the Northern District of Illinois. (Record, 40, 52-3.)

The records therein were finally brought to this court, where the cases appeared as *Hardin* v. *Jordan*, 140 U. S., 371, and *Mitchell* v. *Smale*, *ib.*, 406.

The writ of error in the latter case was here prosecuted by Charles B. Shedd, the defendant in error herein; and he set up the decision of this court, and claimed the benefit of it in this proceeding (Record, 54-55); he being the grantee of Charles H. Mitchell, the plaintiff in said cause. (Record, 14, 59.)

3. Some features of the present case, upon the pleadings in the Circuit Court of Cook County, Illinois.

A remedy which was likely to be more effective and comprehensive than such as would be afforded by ejectment was sought by defendant in error, Charles B. Shedd, in the filing of two petitions in that court.

This was done under the Act of the General Assembly of the State of Illinois, entitled, "An Act to remedy the evils consequent upon the destruction of any public records by fire or otherwise," approved May 9, 1872. Provision was made by said Act, in Section 11, as well as in other sections, for the special proceedings thus begun.

In general character these were chancery proceedings. (Rev. Stat. of Ill., 1899, Hurd, Ch. 116, p. 1372.)

Of the Pleadings.

(a.) The earlier of such petitions became known as the petition of Charles B. Shedd in No. 442 B. R. (burnt records, meaning). (Record, 10-13.) That petition was filed June 29, 1888.

It alleged, *inter alia*, that the petitioner was at the time of the destruction of the records of Cook County, Illinois, on or about the 9th day of October, 1871, the owner in fee simple, and still remained the owner, of Fractional Section 29, Township 37 north, Range 15, east of the Third Principal Meridian. The petitioner traced his title thereto from Stephen A. Douglas by certain mesne conveyances and evidences of title, including the certificate which was issued by the register of the United States Land Office, in Chicago, to said Douglas, on the 1st of October, 1855. The petition alleged that the petitioner was in possession of the south-west quarter of the south-west quarter of said tract so far as the same was not covered by water, except about seven acres thereof in the extreme south-west corner thereof, the possession of which was claimed by Frank I. Bennett; that said Bennett, and James W. Converse and Conrad N. Jordan claimed to have possession of the north half of the south-

west quarter and the south half of the north-west quarter, so far as the same was not covered with water, by William Bush, their tenant; that Andrew Crawford claimed to have possession of the north half of the north-west quarter so far as the same was not covered with water; but as to the lands, the possession of which was claimed by Frank I. Bennett and Andrew Crawford no one was in the actual occupancy thereof, and that the South Chicago and Southern Railroad Company was in possession of a strip of land used for right of way running through a portion of said section.

Sundry persons, besides those just named, were named as defendants, according to the said Act of the General Assembly of Illinois; and among the persons so named were Gertrude H. Hardin and Conrad N. Jordan. (Record, 13.)

The description given in the petition of the lands of which the petitioner claimed to be the owner was, in substance, the same description which was given in the patent to Stephen A. Douglas. (Record, 10, 60.) But from the recitals as to the claims by Frank I. Bennett, James W. Converse, Conrad N. Jordan, Andrew Crawford and the South Chicago and Southern Railroad Company, it may be said to appear, on looking at the plat, that the petitioner claimed the whole of Section 29, not only the part which was represented on the plat of the survey of 1834-5, but also the parts which were represented by the plat of the survey of 1874, extending lines through the lake.

The second of such petitions was filed June 30, 1888. The case under it became known as No. 443 B. R. (Rec-

ord, 14.) In this petition he, the said Charles B. Shedd, claimed to be the owner in fee simple of

> "the fractional south-west quarter of Fractional Section 20, in Township 37 north, Range 15, east of the Third Principal Meridian (including and embracing the west half of said south-west quarter and the south half of the east half of said south-west quarter, and Lot 2 of the said south-west quarter, according to and as described in the survey of said lands by the officers of the United States Land Office in the year 1874)."

The recitals indicate that the claim of the petitioner was for the whole of the south-west quarter of Section 20, not only that which was embraced within the survey of 1834-5, but also that which was included in said survey of 1874.

The petitioner traced title from Horatio B. DeWitt aforesaid, and recited the aforesaid patent to said DeWitt for the south-west fractional quarter of Fractional Section 20.

By the latter petition both the present plaintiffs in error were, with Conrad N. Jordan and others, made defendants.

In answer to the petition in No. 442, said Gertrude H. Hardin alleged, among other things, that the title of the petitioner to any portion of Fractional Section 29 was limited to a tract of about seven acres in the south-west corner thereof, together with such rights as the law conferred upon him to the bed of the lake abutting upon said seven acres; and that the said petitioner was only entitled to such portions of the lake bed as might not conflict with the rights of other shore owners, and more especially with the rights of said Gertrude H. Hardin.

The respondent claimed to be the owner in fee of a large portion of Section 29, the same being a part of the lake bed, a part vesting in the respondent by reason of the original title of John Holbrook through whom she traced title, as to the tracts entered by and patented to him as aforesaid.

The respondent stated that there should be a fair adjustment of the rights of the petitioner and of the respondent in respect to the lake bed, and that the lake bed, as shown upon the plat of the original survey, should be fairly divided. Respondent referred, also, to her answer to the petition of said Shedd, in No. 443 B. R., it containing recitals applicable to both cases.

In the latter answer said respondent claimed to be the owner in fee of the lands described in the aforesaid patent to John Holbrook, except a certain right of way of the South Chicago and Southern Railroad Company (now known as the Calumet River Railroad Company), running through fractional south-east quarter of Section 19, and fractional north-east quarter of Section 30, and also except a strip, theretofore conveyed to the Cook County Canal and Dock Company, of 400 feet in width, north and south, extending from the Calumet River eastward to the center of Wolf Lake, the south line of said strip corresponding with and being in part a prolongation of the south line of the south-east quarter of Section 19.

The suggestions of this answer, as to the surveys, the topography of the lake region, and other details, will be noticed later under another head.

The answer submitted that there should be a fair adjustment of the rights of petitioner Shedd, and of the respondent.

This answer referred (Record, 29), to five ejectment suits which were brought by said respondent October 27, 1882, against parties claiming to be in possession of portions of the lake bed represented on the plat of the survey, which suits were removed to the United States Circuit Court for the Northern District of Illinois as aforesaid; and also referred to the fact that the judgment in such cases (which had been consolidated under the title of *Hardin* v. *Jordan*) was subject to review, and to be reversed by this Honorable Court, upon a writ of error then pending. (The case was *Hardin* v. *Jordan*, 140 U. S., 371.)

The answer of the Cook County Canal and Dock Company to the petition of said Charles B. Shedd referred to and adopted the answer of Gertrude H. Hardin, and claimed the benefit of the conveyance to said company by Gertrude H. Hardin of a strip of land described in her answer, the same being 400 feet in width extending from the Calumet River eastward to the center of Wolf Lake, and bounded as has already been stated.

The two cases so begun by Mr. Charles B. Shedd, defendant in error herein, were consolidated. (Record, 55.)

A supplemental petition of Charles B. Shedd in the consolidated cases was filed September 21, 1891.

In such petition, after referring to the fact that Conrad N. Jordan, a defendant in said cases, had in his pleadings relied upon and set up in bar the judgment of the United States Circuit Court for the Northern District of Illinois, rendered the 1st of February, 1886, in *Mitchell* v. *Smale*, the late Judge Gresham presiding, the petitioner proceeded to state that a writ of error was sued

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out for the reversal of such judgment, and that this court, upon hearing the writ of error, reversed said judgment, and remanded the cause to said Circuit Court, with directions, under which directions, to wit: on the 12th of June, 1891, a judgment was rendered by said Circuit Court, which said judgment was for said Charles B. Shedd for said fractional south-west quarter of said fractional section 20, together with all riparian rights, privileges and benefits incident to the position and location of said lands with reference to Wolf and Hyde Lakes. This supplemental petition insisted that said defendant Jordan had no title nor interest in the lands claimed by him, and that the survey of 1874, as set up by him, was void; and said petitioner, Charles B. Shedd, relied upon the judgment in said case as an estoppel of record, precluding said Jordan and the other defendants in said suit of *Mitchell* v. *Smale*, and others, from asserting any title or interest to or in south-west fractional quarter of Section 20, or in fractional Section 29, or any part thereof, under the said survey of 1874. (Record, 55.)

Amendments to the answer of Gertrude H. Hardin were made August 13, 1891; in which said amendments said Gertrude H. Hardin stated that prior to the survey by the United States the proprietary right in the lands in question and to the lake bed was in the United States; that after the original survey the lands in Township 37 North, Range 15 East, were regularly brought into market, in pursuance of the act of Congress in such case provided; that the same were sold and granted by the United States according to the plat of the survey thereof returned to the General Land Office by the Surveyor General, and without any reservation on the part

of the United States in respect to the lake bed, or any part of the same; that the patentees or their grantees and assigns became and were seized of all the proprietary right in respect to the lake bed which had previously been in the United States; that the United States could not, after having disposed of its proprietary rights, interfere in any manner with the rights of the patentees, including said John Holbrook; that the attempted survey of 1874 was wholly unauthorized and irregular; that the original survey as represented by the plat thereof was not subject to be superseded after the United States sold and conveyed the lands according to such plat. That the rights of the patentees were fixed by the common law, and that the method of adjustment of the lines extending into the lake, or through or over the body of water represented on the plat as a lake, was governed by said law, and that under and by virtue of the patent said respondent claimed to the center of the lake.

That at the time of the original survey of the township, and for many years thereafter, the lake was the receptacle for the waters falling in a considerable district of country; that some of the conditions pertaining to the lake had greatly changed prior to 1874, which was a period of low waters in that vicinity; that respondent believed the original survey to be fair and regular, and not liable to any just exception; that it was not in the power of respondent to state all the conditions existing at the time of the original survey; that the supposed survey of 1874 was based upon a false theory, to wit: on the theory that the meander of the lake, although not represented on the plat, became a boundary, and also under another false theory and assumption, to wit: that the United States had reserved the lake. (Record, 31.)

That in *Hardin* v. *Jordan, supra,* the judgment of the Circuit Court of the United States for the Northern District of Illinois, set up adversely, had been reversed by the Supreme Court of the United States, and that in accordance with the order remanding the case to said Circuit Court a judgment was rendered in the latter court on the 10th of June, 1891, in favor of said respondent, Gertrude H. Hardin, that she was entitled to recover the premises described in the declaration. That in and by this judgment it was found that this respondent, the plaintiff in said case, was seized in fee simple of such premises, and that the south-east fractional quarter of Section 19, the north-east fractional quarter of Section 30, and the east fraction of the south-east fractional quarter of Section 30, were bounded by or situated on a lake which was and is non-navigable, and that she, the plaintiff in said ejectment suit, had the rights of a riparian proprietor in respect to said lake; that her seisin as to the two first named tracts extended to the center of Wolf Lake, and that as to the east part of the south-east fractional quarter of Section 30, such seisin extended to the middle of the bay or projection of the lake in front of the same.

The answer asserted that the judgments in the Supreme Court of the United States, and in the Circuit Court of the United States for the Northern District of Illinois, construed the patent to said Holbrook, and held that the same gave rights to the lake bed to the center of the lake; and respondent relied upon the adjudication in said case. The answer also stated that it was true, as found in said case, that the lake was and is a non-navigable lake. (Record, 33.)

The answer also claimed all of the south half of Section 30, which was east of a line drawn north and south at a distance of eighty rods east of and parallel with the north and south center line of said Section 30 (Record, 33); this being partly under a conveyance to respondent, Gertrude H. Hardin, by William H. Rand and wife, and Nelson A. Steele and wife, in their own right, and as executor and executrix of the last will and testament of Charles R. Steele, deceased, dated December 20, 1889.

Title under this deed was traced in an amendment to the cross-petition of said Gertrude H. Hardin, November 20, 1891. The title was traced by certain mesne conveyances from the entry made by William B. Egan, at the Land Office in Chicago, February 25, 1853, and from the patent to said Egan, dated August 1, 1853. (Record, 45.)

Such cross-petition set forth jurisdictional allegations under the Burnt Records Act, and claimed ownership in fee by said Gertrude H. Hardin of the property covered by the aforesaid patent to John Holbrook, including, also, a large part of the south-west quarter of Section 20 and of Section 29, the Congressional lines of the original survey to be extended into the lake; and further claimed that said Gertrude H. Hardin was "owner in fee to the center of said lake." (Record, 40-41.)

By the amendment filed August 13, 1891, said Gertrude H. Hardin alleged that proprietary right to the lands in question and to the lake bed was in the United States when the lands were first surveyed and platted, and passed to the patentees, including John Holbrook. That the survey of 1874 was unauthorized. That said Gertrude H. Hardin also set up claim to the center of

the lake as following from or growing out of the grant made by patent of land bordering on the lake. The judgment of the Circuit Court of the United States rendered June 10, 1891, under the mandate in *Hardin* v. *Jordan, supra,* as aforesaid, was in this amendment set up and relied upon; and affirmative relief was asked, as applicable to the aforesaid tracts in Sections 19 and 30, respectively, and as to such portions of the bed of the lake, as shown in the plat of the original survey, as said Gertrude H. Hardin should have as the owner and proprietor of lands bordering upon the waters of the lake.

This cross-petition made a large number of persons, including said Charles B. Shedd, defendants, and made reference to the answer of said Gertrude H. Hardin to the petition in 443 B. R., and asserted a claim of ownership to the center of the lake under the patent for the lands represented on the plat as bordering on the lake.

The answer of Charles B. Shedd to the cross-petition of Gertrude H. Hardin disclaimed any interest in the lands as described in the patent to John Holbrook, except such rights as said Shedd might have as riparian owner of the lands previously referred to by him as being owned by him, to wit: South-west fractional quarter of Section 20, and Fractional Section 29, and denied any right of Gertrude H. Hardin as owner of any part of the land so claimed by him in his original petitions.

Certain allegations in the pleadings on the part of Mrs. Hardin as to a narrow spur or promontory extending in a southerly direction from the south-west fractional quarter of Section 20 were admitted, as were also certain allegations as to why it was unnecessary for the United States Surveyor to survey such spurs. (Record, 50.)

Further mention of the extent of the spur and of the space between it and Fractional Section 29 (Record, 50) and east fraction of the south-east fractional quarter of Section 30, will hereafter be made, both as to pleadings and evidence.

Issue was joined as between petitioner Shedd and respondent Gertrude H. Hardin by the replication of said Shedd. (Record, 51.)

Issue was in like manner joined under the cross-petition of said Gertrude H. Hardin. (Record, 50.)

OF THE EVIDENCE.

(b) A hearing was had in the Circuit Court of Cook County, Illinois (the Honorable Murray F. Tuley, Judge, presiding), which was begun at the October term, 1891, of said court.

Petitioner Shedd introduced in evidence a certified transcript of a receipt from the Receiver at the Land Office in Chicago, Illinois, July 10, 1848, showing that Horatio B. DeWitt had made full payment for the south-west fractional quarter of Fractional Section 20, Township No. 37 North, Range No. 15 East, containing 4.53 acres, at the rate of $1.25 per acre. (Record, 57.) Also an exemplification of a patent from the United States to said Horatio B. De Witt for the same land, March 1, 1850. The title in said Shedd was traced under said receipt and patent. (Record, 58-9.)

Also he introduced in evidence a certified transcript of the register's receipt issued at the Land Office, at Chicago, May 8, 1855, to Stephen A. Douglas, showing the purchase by said Douglas of the lot or Fractional Section No. 29, in said township and range, containing 7.37

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acres, at the rate of $2.50 per acre. (Record, 59.) Also a certified transcript of a patent from the United States to said Stephen A. Douglas, October 1, 1855, describing the land as "Fractional Section 29", etc. (Record, 60.)

Title in said Shedd was traced under the said patentee by certain mesne conveyances. (Record, 61.)

Also the petitioner introduced in evidence a certified copy of the field notes of the original survey in 1834-5 of Sections 19, 20, 30, 31, and 32, and of the meanders of the lake. (Record, 62-70.)

The complexion of the case, on the hearing had in the Circuit Court of Cook County, was mainly that of a contest of claims based on the survey in 1874 of the lake bed.

A great deal of testimony bearing, or supposed to bear, upon those claims, was introduced.

The testimony of fifteen or more witnesses, called for oral examination in court, or examined by deposition, in behalf of Conrad N. Jordan, Franklin A. Cleaveland, or other of the claimants under said survey of the lake bed, is embodied in this record.

The theory of the parties calling those witnesses was that the meander of the lake in the surveys of 1834-5 signified a reservation of it by the United States, and further that the survey of the same, as public land in 1874, could in a measure be justified by showing land within the lake limits susceptible of use or cultivation. There was also an effort to support a defense under the limitation laws of the state.

The claimants under the survey of 1874 sought to show that in the area represented by the official plat as a

lake there were as early as 1874 quantities of land which by the recession of waters had become unsubmerged, or which had generally been unsubmerged. They contended, therefore, that the United States then had a right to survey and offer for pre-emption or sale the lake bed as a part of the public lands.

In showing the topography of the lake bed, it was the object of the claimants to show, if possible, a right to hold all that was meandered.

We have, besides, in this record, the testimony of nine or ten witnesses called in behalf of Mr. Shedd, the present defendant in error, explaining to some extent the topography or characteristics of the lake bed; and, on the other hand, the record contains the testimony of about eight witnesses on the part of Mrs. Hardin, plaintiff in error, bearing upon such matters.

In view of the fact that the survey of 1834-5 was held to be good and sufficient, and that the attack made upon it by the claimants under the second survey was held to be unwarranted, a minute abstract of much of this testimony would seem to be unnecessary; for considerable portions of it have but little, if any, bearing upon the questions to be discussed in this case.

The parties now before the court are so far governed by the official plat of the survey of 1834-5 that they cannot seriously question it or dispute its general correctness.

Upon observing the map of the survey of 1834 (see map No. 1 *ante*, or map between pp. 106 and 107 of record, or map between pp. 60 and 61 of record), it will be seen that the fractional township surveyed was one, to a great extent, of

low or wet lands. Almost the entire area would seem to have been submerged or overflowed by the waters of the "Little Kalamick River" and the then so-called "Navigable Lake." Evidently the territory as a whole was low or marshy.

The contour lines on each side of the river, and of the marsh extending two miles northward from the lake, indicate low, swampy ground. Low lands seemed to extend south from the lake also to the Grand Calumet River. (See said map.)

In 1868 or 1869 the government commenced work for the improvement of the Little Calumet River and the harbor at its mouth. (Record, 291-2.) This, with other causes, seems to have had a great effect upon the flow of water from the Calumet River into Lake Michigan, the drainage of the district and the recession of the lake. (*Ib.*, 292.)

Prior to the improvement by the Government of the Calumet River and harbor, a bar existed at the mouth of the river. The action of the waters of Lake Michigan created the bar, by piling sand across the mouth of the river, and obstructing the outward flow of water in the river. (Record, 291-2.)

The water of the river being thus held in check, would set back and overflow the adjacent low lands and also run into Wolf Lake. (Record, 164, 292-3.) The deepening of the river, and opening of its mouth, lowered Wolf Lake, and prevented the flow from the river to that lake, which flow was formerly of frequent occurrence. (Cross-Ex. by Mr. Shedd's counsel of witness Rosenquist; Record, 255.)

The Little Calumet River (now generally known as

Calumet River) has its source in Indiana, whence it flows about forty miles prior to the augmentation of its waters by the junction with it of the Grand Calumet River at a point about a mile south-west of Wolf Lake. The source of the latter river or branch is also in Indiana. The Grand Calumet runs parallel to some extent with the (Little) Calumet River, a distance of about twelve miles, until such junction is formed; this being near the south line of the fractional township in which the lake here in question is situated. (Record. 61, 306.)

The effect formerly existing might, to some extent, in high stages of water in Lake Michigan be experienced since the improvement of the river by the Government. (Record, 164, 197.)

During low water periods in Lake Michigan the water of Wolf Lake, and in the marshes, would from evaporation, especially in dry seasons, become lowered. Mr. Shedd, the defendant in error, testified that in such seasons the lake being land-locked, and evaporation great. the water would lower and dry up quickly. (Record, 89.) Prevailing north winds would at times cause the water of Lake Michigan in its southerly part to rise and set back, and the effect would be observable upon Wolf Lake and the adjacent marshes. Nor did the influences of Lake Michigan and the Calumet River stand alone; for Wolf Lake was influenced from other causes, such as rainfall and the melting snows. Evidently in earlier times Wolf Lake was the natural receptacle for the water from much territory in nearly all directions. (Record, 73.) The lake was often higher than Lake Michigan; and the small outlet extending from the west into the Calumet River, being only forty links wide, became subject to be much obstructed (Record, 69, 73);

and action on Wolf Lake in sympathy with the Little Calumet thus became slower or less certain.

At times of such obstruction the water in Wolf Lake would reach a level as high as from six inches to five feet above Lake Michigan. (Record, 284.) When the bar at the mouth of Wolf River (through which there might be made a direct connection with Lake Michigan) would be cut, so as to open a channel, the water of Wolf Lake would be lowered rapidly, to bring it more nearly into a level with Lake Michigan. (Record, 122.)

Mr. Shedd, the defendant in error, having ice houses on the north shore of the lake, frequently made the opening to let the water out. (Record, 78-9.) But during a period longer than twenty years, he said he had never seen the water flow through the bar at the mouth of that arm from natural causes, unassisted. (Record, 80.) He had, when a channel was opened to Lake Michigan, seen the water carry out the sand in large quantities; a stream of water running into that lake that could be seen a long distance; the water in Wolf Lake at such times seeming to be a good deal higher than in Lake Michigan.

The fluctuations of Lake Michigan covered an altitude of about seven feet, ranging as high as five feet above a bench mark commonly called *datum* (Record, 175), and as low as two feet below *datum*. (Record, 176.) This bench mark was established in 1847 as a base from which to estimate elevations for many purposes; and the city has since 1855 kept a record of the elevations of Lake Michigan. (Record, 61.)

Fluctuations in Lake Michigan are somewhat attributable to the precipitation of rain and snow, the records

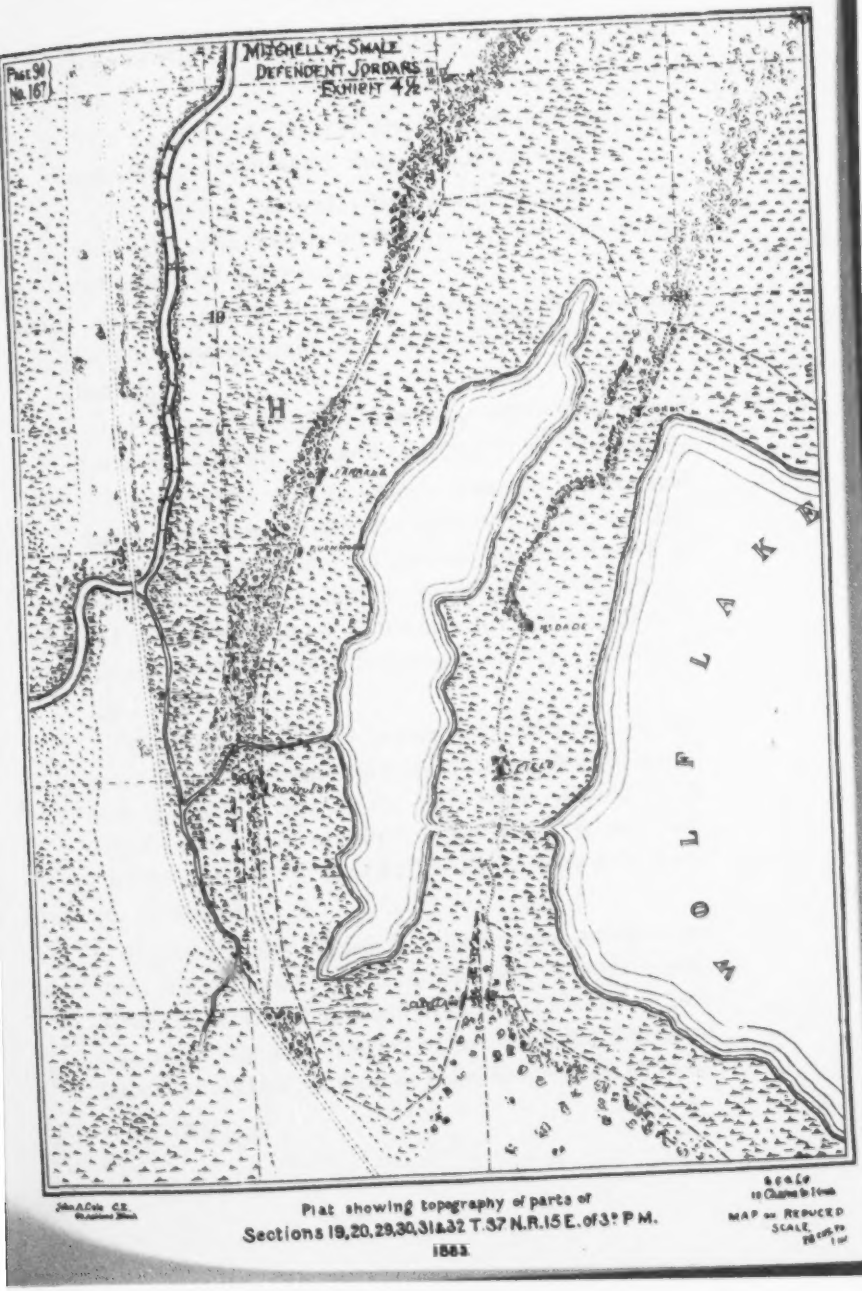
seeming to indicate periods during a series of years of high water and corresponding periods of low water, the high water periods probably being the longest. (Record, 285, 324.) The average elevation of the water for a period of thirty years is said to have been two feet above city datum (Record, 174), and the yearly average of some years is stated as 2.9 and 3.0 feet above datum. (Record. 175.)

The water of Wolf Lake was sometimes reduced by the action of the claimants under the survey of 1874, by opening a cut from the arm Wolf River to Lake Michigan. Wishing to have land uncovered for use, they would cut through the bar at Lake Michigan. In one instance, the height of the water was thus reduced as much as thirty-three inches (Record, 118, 122), making a channel 100 feet wide and 12 feet deep into Lake Michigan. (Record, 118.)

Some of the pre-emptors or patentees under the survey of 1874 had prior to such survey squatted upon slight margins or sinuosities of the shore near the original meander line, and some upon islands and areas brought into existence by the recession or evaporation of the water (Record, 92), within the original lake bed. These houses are shown on a map marked "Jordan's Exhibit 4½" (being an exhibit on behalf of Jordan in *Mitchell* v. *Smale*) and "Hardin's Exhibit 1, Cole." (Record, 173.) (Map No. 3 herein.)

JORDAN'S EXHIBIT 4½ AND HARDIN'S EXHIBIT 1, COLE.

MAP No. 3.



SPECIFICATION OF LOCATIONS MADE UNDER THE SURVEY OF 1874.

On the shore of the lake, and close to the dotted line representing the meander line, were the houses of:

(1) Andrew Farrand, who under the survey of 1874 was by the Land Officers awarded Lots 1 and 2 in south-east quarter of Section 19;

(2) Chester B. Rushmore, awarded under said survey Lot 1 and east half of the north-east quarter of Section 30;

(3) Joseph Konyvesy, claiming under said survey Lot 2 in west half of south-east quarter of Section 30;

(4) Franklin A. Cleaveland, awarded under said survey north-east quarter of south-east quarter, and Lot 3 of south-east quarter of Section 30. and Lot 1 of north-east quarter of Section 31; house on Section 31, and barn on Section 30, at the meander line and close to the section line between Sections 30 and 31. (Record, 139.)

(5) Solomon Field was awarded, under said survey, south half of north-west quarter and north half of south-west quarter of Section 29. His house was on "Elm Island," sometimes so-called. (Record, 375; see, also, "Jordan's Map C," "Shedd's Exhibit": Record, between pp. 90 and 92.)

This island was subject to entire submergence in periods of high water. (Record. 391, 320.) South of and between Elm Island, or Field's place, and Fractional Section 29 and the east fraction of the south-east fractional quarter of Section 30, a cut or channel was made by hunt-

ers for the passage of small skiffs across what was at low water a marsh (Record, 289, 352); the bed of the lake here being lower than it is either north or south. (Record, 165.) The cut or channel is shown on the Cole map. (Record, 173.) (Map No. 3 *ante*.)

Mr. Shedd testified that the higher ground comprising Fractional Section 29 extended 600 or 800 feet or more north of the south line of said fraction. (Record, 73.) The distance stated is something less than the length of the line which was run, as per the field notes, from the corner of Fractional Sections 29 and 30 northward to the intersection of the bank of the lake; such line being in length 14.50 chains (or 957 feet). (Record, 66.)

(6) North of Elm Island or Field's place, Lyman D. McDaid, who claimed the north half of north-west quarter of Section 29, had squatted, having a small shanty on a narrow strip called by one of the witnesses "Crescent-Shaped Island." (Record, 286.)

(7.) North of this "Crescent Shaped Island" was another narrow area upon which Alice Condit had squatted, claiming the whole of the south-west quarter of Section 20, except the small area in the north-east corner patented to DeWitt.

West and north of the Condit house was another small narrow area. Both these areas were above the level of the bed on either side; the westerly area being subject to complete submergence in certain stages, and the easterly one also being subject to submergence north of the Condit house at certain stages; the space upon which the house stood, and for a short distance south, being like an island. (Record, 91; Shedd's Map C.) The area

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north of the house, and south of the DeWitt tract, was lower than either of those tracts. (Map C.)

These areas, and in general the bed between Fractional Section 29 and the east fraction of the south-east fractional quarter of Section 30 and the fractional south-west quarter of Section 20 (the DeWitt tract), were higher than the bed of the lake on either side thereof. There was a tendency, especially in low water, to cause a separation of the lake into two bodies. (Record, 325.) When the water stood at 2.5 feet above city *datum*, it was one lake. If, however, the water fell to within 2.0 feet above *datum*, there would be a divide as if into two lakes. If at one foot above *datum*, there would be a larger divide. The westerly lake was the most shallow, and would be divided into small ponds when the water reached one foot below *datum*. (Record, 324.)

Some of the squatter claimants (Cleaveland, Rushmore, Smale and Munhoven) assisted in making the survey of 1874 by Wolcott; sometimes by wading the lake; at times through water as high as their chins. (Record, 141-4.)

Soon after Mr. Field settled on his pre-emption claim, embracing 160 acres in Section 29, to wit: South half of north-west quarter and north half of south-west quarter, he constructed a road south from his home (on "Elm Island") across the marsh (part of the bed of the lake), and built a bridge over the small channel which had been made by hunters. (Record, 379.) He also extended the road to a point north of the Condit house. (Record, 116.) Such road ran lengthwise over the "crescent-shaped island," and then across to the narrow area upon which the Condit house was situated; the space between

being filled with earth, corduroy, brush and hay. Much testimony was introduced by Mr. Shedd to show this artificial connection. Besides his own testimony as to the wet and swampy condition between the two higher elevations (Record, 72, 404), he introduced testimony of three witnesses; one of whom was his business associate, Mr. John S. Field, to show that the water covered at times this area. Other testimony was also of the same purport.

Surveyor Rossiter, testifying on behalf of Mr. Shedd, said that recently, it being during the trial, he had examined for Mr. Shedd the artificial conditions, and had taken elevations thereon, and of the locality, with reference to city *datum*. (Record, 369, 370.)

The road constructed by Field is shown on the Jordan-Cole map. (Record, 173.) This road does not appear to be shown on the topographical Map C. (Record, 91.)

South of the Condit strip along the road, in the intervening space between that strip and "Crescent-Shaped Island," there were small trees of recent growth, like poplar and willows. (Record, 181.) On the Condit strip and at the south end of the "Crescent-Shaped Island" there were elms.

Looking further at the Cole map (Record, 172-3, Map No. 3, *ante*), we shall see two narrow strips shown in darker and closer characters than those which represent marsh, both extending southerly from near the center of Section 20, and the westerly one of which is short. These (speaking of the outlines on the map), indicate higher elevations than those of the bed of the lake or of the marsh on either side, and the characters used represent them as having a growth of trees or shrubs.

The two strips join or become one strip at or near the meander line near and south of the center of Section 20, where for some distance both north and south of the meander line the area or strip is shown as a plain, or as marsh, without trees or shrubs, and in this respect like other parts indicative of low or marshy features.

It should be borne in mind, in considering the Cole map lately mentioned, that it purports to represent conditions as of 1883, and not as of 1834. A considerable part of the area between the two bodies of water is indicated by this map as being a swamp or marsh which might be taken as part of the lake under ordinary circumstances. (Record, 173.) The water lines represent the open water of the lake free from exposure therein of marsh growth. (Record, 169.) In bringing the map to a reduced scale to fit into the record, the location of the houses of squatters is indistinct. But on the map (No. 3) *ante* we have indicated for convenience of reference the houses in red color.

The general correctness of the original survey in running the lines and fixing outer half-section corners appears from the evidence, and when the surveyor notes that a line was run to the margin or border or bank of the lake at a certain point, and that corners to the fractional quarter section were established, such was the case. (Record, 65, 66, 67, 68, 309.) Likewise, the protraction in the General Land Office of the half-section lines to the lake seems to have been accurate. Surveyor F. C. Rossiter found the corners stated by the field notes to be by the margin or border of the lake correct. (*Ib.*, 312.),

ELEVATIONS OF THE WATER OF THE LAKE WITH REFERENCE TO CITY DATUM PRIOR TO THE SURVEY OF 1874 DO NOT SEEM TO HAVE BEEN TAKEN.

The stage of water existing at the time of the survey of 1834 is, however, disclosed in some measure by the Field Notes. For example, the depth of the water in certain places through which section lines were run is stated in some instances, as is also the character of some of the land traversed in the survey. In one instance, having reference to a line run south between sections 19 and 20, where there are three calls, the Deputy Surveyor, in closing his reference to the third call, said, "marsh water from 6 to 40 inches deep." (Record, 68.) This appears to show that the water was not less than five and one-half feet above city *datum*. (Record, 315.)

Again, in running the meander line along the northerly margin of the lake along fractional section 20, the notes say the land was all marsh, and that the water was from six inches to three and one-half feet deep (Record, 70); and as the evidence shows that the highest elevation on the line run is 5.7 above *datum* (Shedd's Exhibit "Jordan's Map C," Record, 91), we have but to assume the elevation to be substantially the same now as then, and it would follow that the water over part of this line was as much above *datum* as is above suggested, if not more. Demonstration of like height of water to that existing in 1834 is furnished by the testimony of Mr. Shedd, who said the present depth of the water in Wolf Lake would not exceed, in any part of the lake, three feet or three and one-half feet (if there was that much), though sometimes he had seen it eight feet deep in places. (Record,

74.) The evidence shows that in consequence of a dam obstructing the flow of water through a cut or channel south of Elm Island, and from the pumping of water from Lake Michigan into Wolf Lake by Mr. Shedd's ice company, for ice purposes, the water was higher in Wolf Lake than in the cut west of the dam (or in Hyde Lake) by twelve inches. (Record, 369.) A witness who gave the levels for two days, near the time he was testifying, said that Hyde Lake was two inches below *datum* and Wolf Lake was 3.28 inches above *datum*. (Record, 326-7.)

From these figures it is shown that the elevation of the bed of Wolf Lake east of the supposed ridge or strip is about two feet below city *datum*, and in the few places where the water was eight feet deep the height of the water would reach six feet above *datum*.

A SECOND MEANDER IN PART OF THE LAKE.

The meander of the lake along section 20 was twice run. The explanation of the second running of this line, in 1835, is probably that only a temporary post was set at the intersection of the first line with the state line between Indiana and Illinois. (Record, 70.) On running the second line, in 1835, the surveyor set a post for the fractional corner, the water being too deep to raise a mound. Evidence was taken as to the construction to be put upon the surveyor's notes in respect to the character of the land traversed by him in meandering along the northerly side of the lake; also as to the inferences to be drawn from the statement in such notes of the depth of the water. (Record, 338-9, 408, 412.)

As to these matters, Mr. Rossiter, a surveyor of much

experience, stated that he regarded the notes as true, in that the higher portions traversed along the southwest fractional quarter of section 20 might have been covered with water to the depth of six inches, (Record, 338-9), though he did not construe the notes as signifying that on the whole line the water was six inches or more deep. He said: "Almost the whole southern end of the section, as represented on the government plat, would be low ground." (Record, 307.)

Witness Samuel S. Greeley, a practical surveyor, called by Mr. Jordan (Record, 413) construed the remark in the Field Notes, "land all marsh; water from six inches to three and a half feet deep" (as stated in the Field Notes of the meander, Record, 70), as an indication of the general character of the ground that the surveyor traversed in section 20; an indication of the character of the land on the meander line and on each side as the surveyor passed along; all being marsh of varying depths of water.

Further of "Jordan's Map C."

A map preceding page 91 of the record is called "Jordan's Map C." It was introduced in evidence by Mr. Shedd. (Record, 91.) It purports to show the topography of the lake bed in contour lines for each foot in elevation. It was constructed from different surveys running from 1886 to 1890. (Record, 178-9.) It professed also to show, though we should say but theoretically, the outlines of the lakes (Wolf and Hyde) at a given stage, namely, at *datum*. (Record, 91.)

The map does not even profess to represent the water as it stood at the time of any special survey. At the time

of one of the surveys, made in August and September, 1888, and from which survey the map was in part constructed, much of the land shown was covered with water (Record, 185-6), the elevation of the water being about two feet above *datum*. (Record, 199.)

In a previous survey in 1883, in which Mr. Shields (under whose supervision map C was constructed, Record, 178), assisted, the water of the lake was 3.5 feet above *datum*. (Record, 192.)

Mr. Shedd, speaking of the map, said that the lightest colored portion south of the name "Condit" was intended, as he supposed, to represent the highest portion of the ridge, which in most ordinary stages of water is dry (Record, 72); that in extreme high water about all of the ridge would be covered with water; and that he had seen the water so high that very little of the ridge would show out of water, it not being possible to get along there except by boat, (Record, 73), but in ordinary stages of high water the whitest portion, as indicated on the map, was probably above water.

This map does not seem to have been constructed with the care usual in map making, there being much contradiction between the elevations of the area within the meander line, given in figures, and the elevations shown by contour lines. The map would be controlled by the elevations shown in figures, and the contour lines should have been drawn to correspond with them.

Mr. Shields, being examined as to the contour lines and the seeming contradictions between them and the elevations shown in figures on Map C, said, in reference to the elevation of the water of the lake at the time of an earlier survey, it being in 1883, and the water being

three and a half feet above *datum,* that the land shown on the map between Wolf and Hyde Lakes, as 2.7, 3.0, 2.1, 0.7 feet in elevation would be overflowed by water at three and one-half feet, as would all elevations below three and one-half feet. (Record, 192, 199.) He further explained (Record, 192) that the time in 1883, when he ascertained the height of the waters as being three and one-half feet, was different from the time of the survey in which he and Mr. Cole surveyed the meander line, from which other survey the map marked "Jordan's Exhibit 4½" was constructed. (Record, 173.)

Map C will be further noticed in a later part of this brief.

FURTHER AS TO ELEVATIONS OF WATER IN THE LAKE SINCE 1874.

Considerable evidence was introduced as to the elevation of the water of the lake with reference to city *datum* since (and for a short time prior to) the survey of 1874.

Mr. Rossiter said that the common name of the lake in the early years of his knowledge of the region was Wolf Lake (Record, 301); that locally the name Hyde Lake may have been applied, but this water was not so known in Chicago.

A part of a map compiled by James H. Rees, published in 1851, entered according to the Act of Congress in that year, was received in evidence with reference to reputation at the time named as to the name of the lake, to wit, Wolf Lake. (Record, 347, 349.) A copy of the map (Record, 349) is shown herein (marked map No. 5).

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MAP No. 5.

HARDINS EXHIBIT
HANDY No. 1.

COPIED FROM MAP ENTITLED

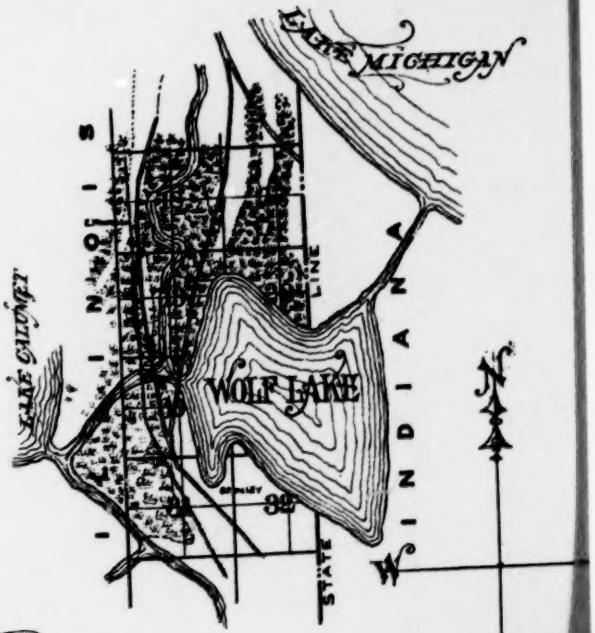
MAP OF THE COUNTIES OF COOK AND DUPAGE, THE EAST PART OF KANE & KENDALL, & THE NORTH PART OF WILL.

STATE OF ILLINOIS.

COMPILED BY
JAMES H. REES
LAND AGENT.
CHICAGO, ILL.

1851.

SCALE, 1 INCH = 100 CHAINS.



FOLLOWING NOTE APPEARS ON SAID MAP

ENTERED ACCORDING TO ACT OF CONGRESS IN THE YEAR 1851 BY JAMES H. REES IN THE CLERKS OFFICE OF THE DISTRICT OF ILLINOIS.

COPIED BY F.C. MORRITZ SURVEYOR ROOM 1 - 91 WASHINGTON ST. CHICAGO ILL.

HARDIN'S EXHIBIT

HANDY No. 2.

COPIED FROM MAP ENTITLED

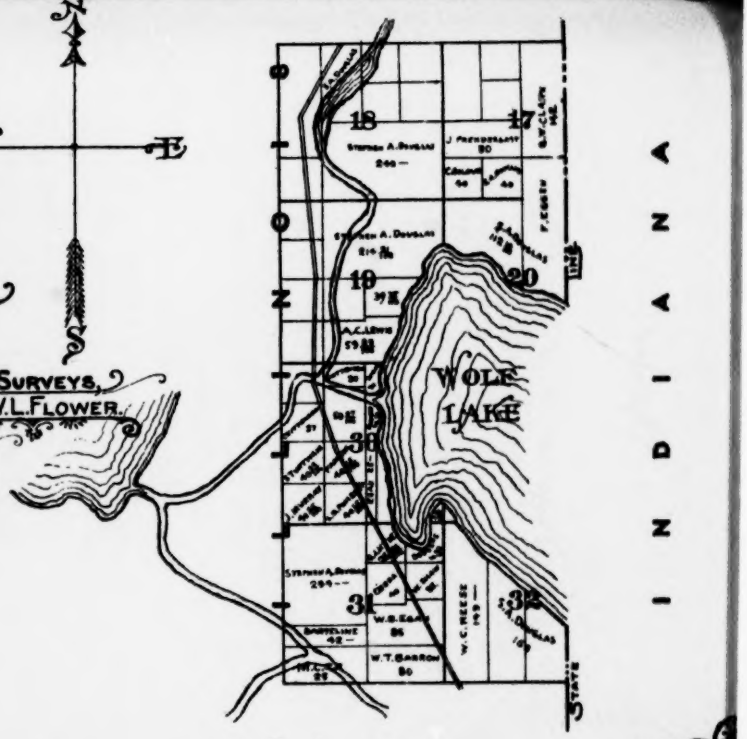
MAP OF COOK COUNTY, ILLINOIS.

COMPILED & DRAWN FROM RECORD & ACTUAL SURVEYS, BY W.L. FLOWER.

PUBLISHED BY S.H. BURHAN & J. VAN VECHTEN.

1861.

MAP No. 6.



COPIED BY E.C. ROSSITER SURVEYOR ROOM 1 — 91 WASHINGTON ST. CHICAGO, ILL.

Another map was also received by the court. It was published in 1861 by S. H. Burham and J. Van Vechten, and was compiled and drawn from record of actual surveys, by W. L. Flower. The lake is thereon designated "Wolf Lake." This map, like the Rees map, shows no areas within the lake borders. (Record, 348.) A copy of the map as shown in the record is herein shown (marked map No. 6).

Mr. Rossiter testified that he knew the lake by personal observation in 1870; that about 1875 he attempted a survey of a tract in the northeast quarter of section 19, the southeast corner of which was in the lake, but the water was so high he was unable to reach the corner to fractional sections 19 and 20, established in the survey of 1834, the water where he went being at least from one to two feet in depth. (Record, 302.) Subsequently he had made a great many surveys, perhaps forty, in and on the border of the lake. (Record, 301.) At many times he had taken the elevation of water, being employed by one Jacob Forsyth with reference to proving the facts in a lawsuit. (Record, 323.) He presented a table showing the elevations and dates. This table is shown herein. (Record, 322.)

Elm Island, said witness Rossiter, would be submerged at a stage above 4.2, that being the highest point he found on the island. (Record, 320.) He did not observe the strip between the two lakes in his early survey, not having gone to that locality. (Record, 326.) The elevations of the water taken by him for Mr. Forsyth were on the lake in Indiana, the surveys not requiring observation of other conditions. (Record, 328.)

He had seen the strip once in 1885 very nearly covered with water, the stage of water at the time being 2.35 above *datum*.

Mr. Shedd, speaking of the elevation of the water with reference to city *datum*, said he at one time marked the water line of the lake and ascertained it was 4.4 feet above *datum*. (Record, 404.) Like testimony was given by Mr. Field, the business associate of Mr. Shedd. (Record, 368.)

It was shown that in May and June, 1885, beginning the work May 25th, a survey was made of a line through the bed of the lake for the South Chicago and Southern Railroad. In such survey the elevations of the bed and of the water were taken. The surveyors used a boat, and hip rubber boots when they were sufficient. (Record, 262-3.) In one case, down about the south line of 20, the water was so deep they had to take off their clothes, drive stakes, turn the boat upside down and get on the top of the boat in using the transit to run the line. (Record, 263.) The average depth of water was about three feet, both east and west of the railroad line. (Record, 264.)

About opposite (west of) Smale's house (Condit house) the water was about four feet deep with three or

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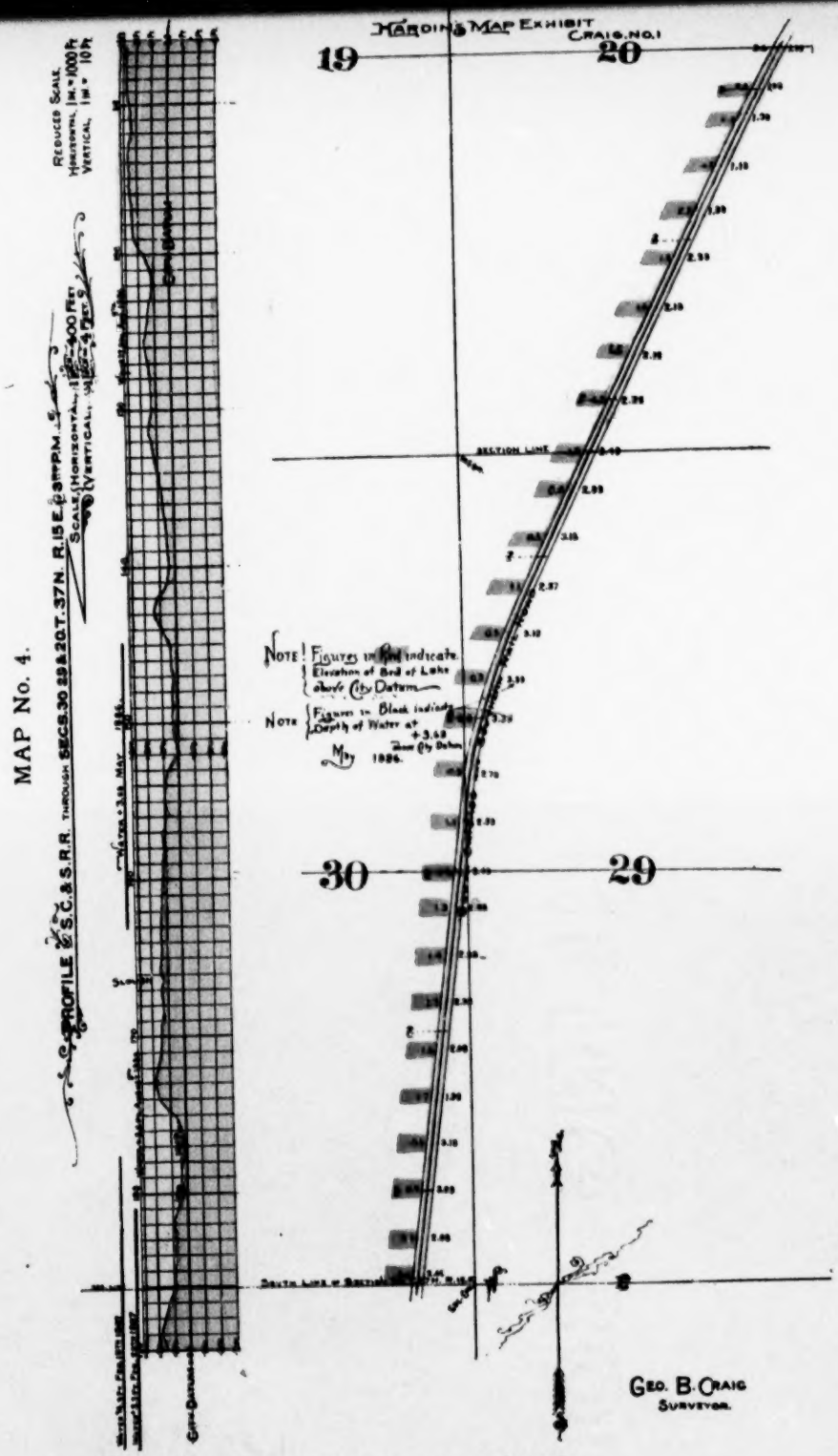
ROSSITER'S ELEVATIONS OF WOLF LAKE.

MONTH.	DATE.	YEAR	FEET ABOVE CITY DATUM.	(RECORD 322.)
January	21	1875	1.33	
February	6	"	1.33	
March	23	"	1.33	
January	3	1876	2.58	
"	14	"	2.58	
"	21	"	2.66	
"	25	"	2.75	
February	9	"	3.05	
"	10	"	2.99	Opened Wolf River. Lake Michigan elevation, 1.14.
"	15	"	2.58	Wolf River open.
"	19	"	1.99	Wolf River open.
"	26	"	1.66	Lake Michigan running in.
March	10	"	1.60	
"	14	"	1.79	
April	22	"	2.87	
"	26	"	2.91	
June	16	"	3.04	
"	20	"	3.16	
"	21	"	3.16	
July	8	"	3.33	Opened Wolf River into Lake Michigan.
September	16	"	3.12	
November	11	"	2.99	
January	11	1877	2.75	
"	26	"	2.87	
February	14	"	3.16	
May	28	"	2.63	
September	5	1878	2.04	
October	9	"	2.04	
November	25	"	2.28	
December	4	"	2.23	
"	5	"	2.33	
February	26	1883	3.43	
March	2	"	3.93	
October	16	"	2.20	
April	27	1885	2.51	
July	12	"	2.35	
June	12	1888	2.21	
July	12	"	2.21	

(Average elevation—2.52.)


MAP No. 4.
C. & S. PROFILE U.S.C.&S.S.R.R. THROUGH SEC'S 30 & 29 & 20 T. 37 N. R. 15 E. 3 RD P.M.
SCALE (HORIZONTAL 1 IN. = 400 FEET
(VERTICAL 1 IN. = 4 FEET
REDUCED SCALE.
HORIZONTAL 1 IN. = 1000 FT.
VERTICAL 1 IN. = 10 FT.
MARGIN & MAP EXHIBIT
CRAIG NO. 1
19
20
30
29
SECTION LINE
NOTE: Figures in Red indicate Elevation of Bed of Lake above City Datum
NOTE: Figures in Black indicate Depth of Water at +3.68 above City Datum
May 1886.
GEO. B. CRAIG
SURVEYOR.

ELEVATION OF WATER ABOVE CITY DATUM.

May—, 1886,	3.68	(See Craig's Testimony, Rec., 264.)
August 9, 1886,	2.80	
February 15, 1887.	4.30	
February 28, 1887,	3.30	

7477

four feet of mud. (Record, 263.) The bottom was better south to Elm Island, the water being about three feet deep, on an average, when floating bog was encountered for a distance of about 300 feet, and from there south there was sand bottom, the water averaging one and a half feet deep, the water east of the line run being at about the same average height as upon the line. (Record, 263-4.) The elevation of the water was taken in May of that year, it being 3.68 feet above *datum*. The water stood August 9, 1886, at 2.80; February 15, 1887, at 4.3, and February 28, 1887, at 3.3 above *datum*.

A map was presented showing the line surveyed with relation to the sections through which it ran. Figures on the right side of the line represent the depth of water at regular points; the figures on the left side of the line represent the elevations of the lake bed with reference to city *datum*. There was also shown on the map a profile of the lake bed showing its surface and representing also the elevation of the water as it stood February 28, 1887, being 3.3 feet above *datum*. Lines indicate other elevations of the lake, as taken, to wit, May, 1886, 3.68; August 9, 1886, 2.8; February 15, 1887, 4.3; February 28, 1887, 3.3. (Rec., 267.)

A copy of this map is shown herein, marked map No. 4.

Mr. Craig, the railroad engineer who made the survey for the R. R. line, said that when the water stood at 4.3 above *datum* there was not much land uncovered with water between the two lakes, only here and there at the north part a little ridge could be seen "peeking out." (Record, 279.) The Field place did not then appear as an island, it being submerged, the houses being sur-

rounded by water and no land being in sight east of and along the railway line, except the tops of ridges, and the ridges were partly covered with water, there being breaks in which the water stood. (Record, 279.)

In July, 1886, the railroad people set dredges at work to enlarge the old outlet of the lake for a part of the way from the little Calumet to the lake, and to make a cut across Indian Ridge on the west shore of the lake in the southeast quarter of section 30, and on through the lake to the line for the railroad. One of the dredges passed northeasterly through the lake to near the east and west center line of section 20. (Record, 156-7.) Both dredges were used to dredge material from the west side of the railroad line, and in the work of making a fill for the railroad bed; and in doing this there was excavated west of the railroad a ditch about thirty-five feet wide and several feet deep. The dredge also enlarged the hunter's ditch south of Elm Island. Afterwards, in 1887, dredges were used to throw up the road bed for the Calumet River Railroad on the west side of the lake. Mr. Craig said that after the cut was made connecting the lake with the river the water varied but little, rising and falling with the river as influenced by the wind on Lake Michigan. Before the ditch was cut evaporation was reducing the water gradually. (Record, 275-6.) After the cut was made the water from the river came into and went out of the lake more freely.

Honorable Walter Q. Gresham, while presiding in the Circuit Court of the United States for the Northern District of Illinois in 1885, at the trial of *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, and, before rendering judgment therein, made a tour of inspection of the premises. (Record, 354.)

He was accompanied by Mr. Kemp, deputy clerk of the court; Mr. Burnham, the court's stenographer; John B. Hawley and John I. Bennett, attorneys for Conrad N. Jordan; William Prescott, attorney for William H. Mitchell, and Mr. I. N. Hardin.

Judge Gresham, like others of the party, was equipped with hip rubber boots, using which he crossed the lake from the Smale place to the Field place. After inspecting the spur or area west of Smale's (Condit house), an effort was made to make a crossing easterly to Smale's house, but it was abandoned. The party returned and then proceeded to inspect the Smale ridge. It was found to be from fifty to 100 feet wide between the water on each side. In some places the top of the ridge was very narrow. (Record, 355-6.) At the point or terminus of the ridge, inspection was made of the corduroy road and the space between the point and the area lying southwesterly, called in the record "Crescent Shaped Island." This island was narrow, and in some places not exceeding twenty-five feet in width, but a mere thread.

From the island Judge Gresham and Messrs. Bennett and Hardin proceeded south to Field's house, the remainder of the party returning to the conveyances and driving out east and making the passage south through the lake by carriages. From the Crescent Shaped Island to Field's the party in boots found a newly constructed road had been made through and across that part of the lake, of brush and material upon which hay had been piled, the water being under as well as upon each side of the road, the weight of the walkers causing the water to appear above the surface of the hay as they proceeded. (Record, 355-6.) From Field's the party proceeded south to Reese's point, and from there around the western shore of the lake and returned home.

In describing the character of the soil and growth south from Smale's to Reese's, the witness Hardin said it was a grassy bar of muck deposit, with a growth of swamp grass, such as is usual in low wet places. Upon the south end of the "Crescent Shaped Island" there were elm trees. Along the center, and extending farther south, they found brush and poplar trees of recent growth. On the Smale ridge were seen elms, basswood, oak and underbrush.

A map representing another survey by Cole, Alvord & Shields, to wit, a survey about September 26, 1891, for Mr. Jordan, was put in evidence as "Jordan's Exhibit D." (Record, 187.) A copy of it is herein shown as map No. 7.

It purports to represent the marginal line of the lake with the water at four inches above *datum.* (Record, 194.) The witness Shields attempted to explain the incongruity and contradiction between maps offered as Jordan's exhibits, in that, map D, while assuming to show water at four inches above *datum* represented less expanse of water than does map C, which assumed to show water at *datum.* (Record, 195-6.)

This explanation was in part that when the survey represented by the map D was begun, water was at a certain point four inches above *datum,* but that before the survey was completed, there had been a great change by evaporation, the lake spreading over much more ground at the beginning than at the close of the survey. (Record, 194-5.) The water receded from fifty to 100 feet in some places.

Witness August Neubeisser, among others, stated that Hyde Lake was divided into small ponds, the water not

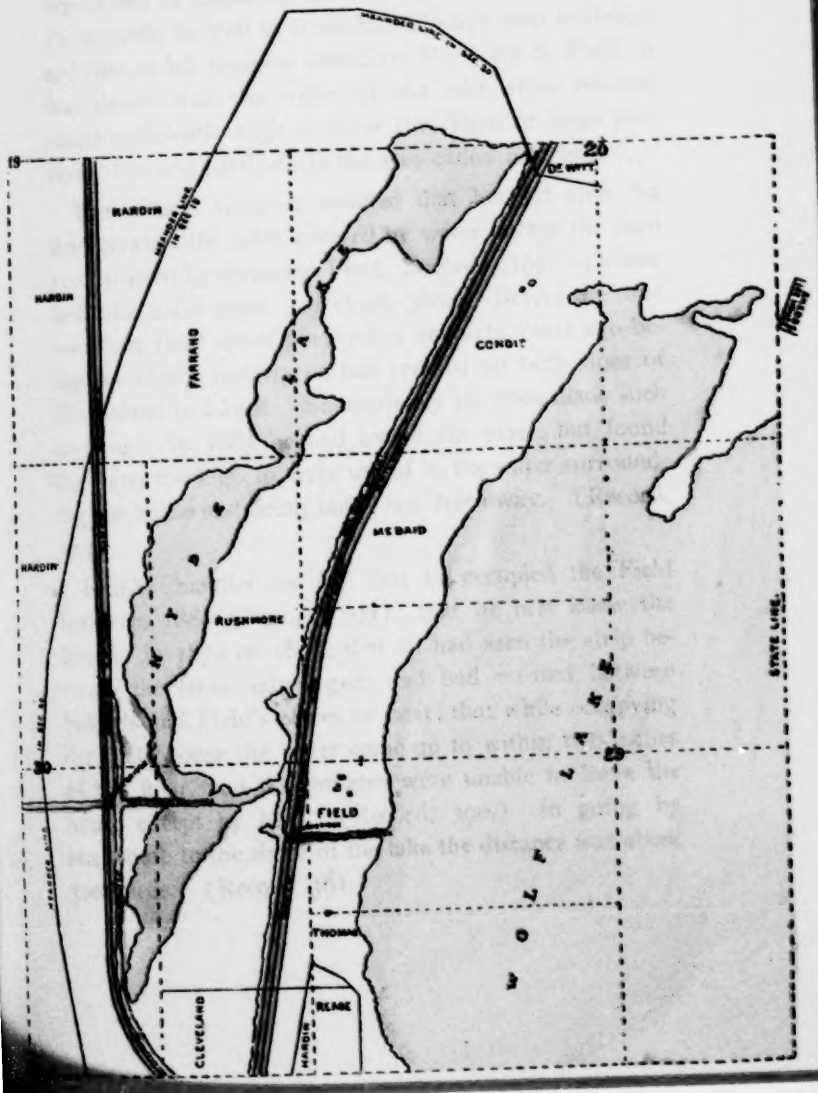
MAP No. 7.

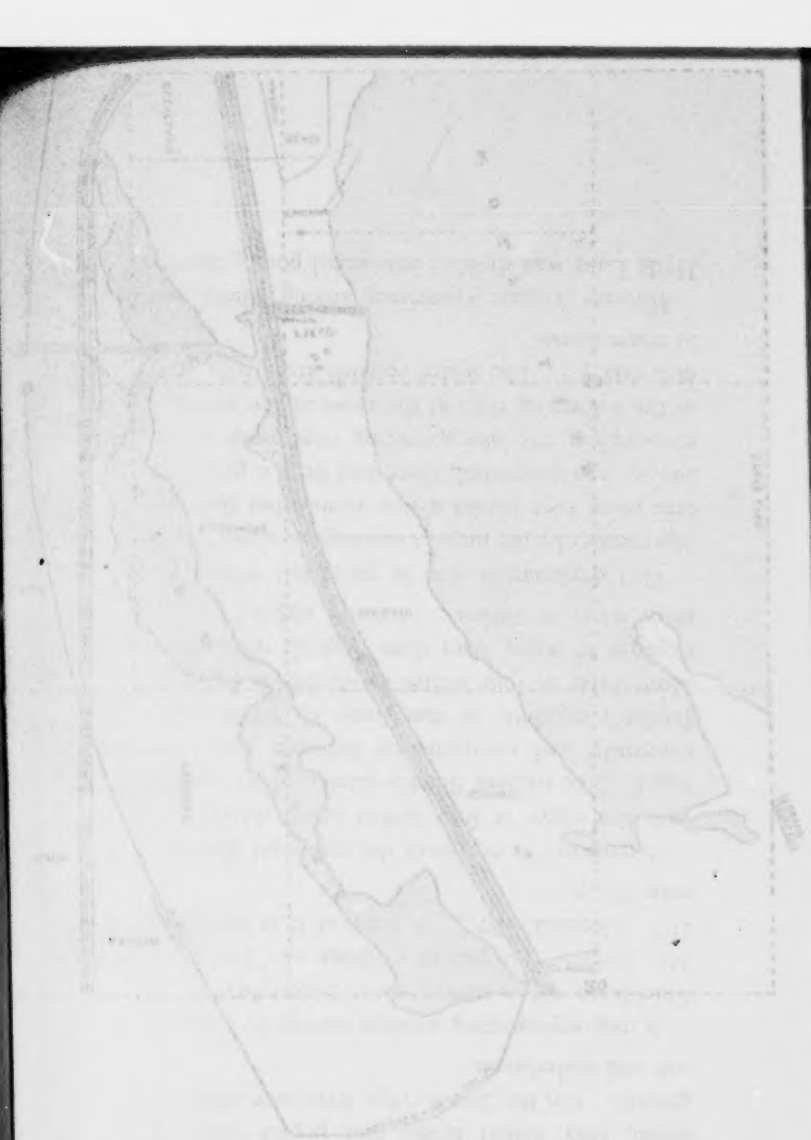
JORDAN'S EXHIBIT D.

PLAT OF PARTS OF SECS. 19, 20, 29 AND 30, T. 37, N., R. 15, EAST OF 3D P. M., SHOWING THE RELATIVE AMOUNT OF LAND AND WATER, AND THE SHORE LINE THEREOF.

DATE OF SURVEY SEPTEMBER 26, 1891.

Elevation of water in Hyde Lake is 0.373 above Lake Michigan. (Meaning *Datum*. See Shields' Test., Rec., 196.)





being of sufficient depth for the use of small boats. (Record, 344, 357.) The elevation of the water in Hyde Lake on one of the days of the trial was two inches below *datum*. (Record, 326.)

In certain depositions taken by Mr. Shedd, to wit, in depositions of Gardner, Chandler, Farnsworth and Mrs. Farnsworth, as well as from Mr. Shedd's own evidence, and that of his business associate, Mr. John S. Field, it was shown that the water of the lake often reached stages sufficiently high to cover the ridge, or large portions of it, and particularly the area called Elm Island.

The witness Gardner testified that he had seen the land between the lakes covered by water except the road (constructed by Solomon Field, Record, 376), and here and there a dry place. (Record, 380.) Before the road was built (and about twenty-five or thirty years ago being the first occasion) he had crossed on both sides of Elm Island in a boat. Subsequently he often made such crossing. In 1883 he had leased the place, but found the water too high to make use of it, the water surrounding the house and being but a few feet away. (Record, 374.)

Frank Chandler testified that he occupied the Field house in 1886 (Record, 393); that he first knew the locality in 1872 or 1873; that he had seen the strip between the lakes submerged, and had crossed between Smale's and Field's places by boat; that while occupying the Field house the water came up to within two inches of the floor, and the inmates were unable to leave the house except by boat. (Record, 390.) In going by boat south to the shore of the lake the distance was about 300 yards. (Record, 391.)

The witness Farnsworth testified that he was familiar with the strip of land between the two lakes and had seen it covered with water two or three times; that he had crossed there in a boat, and that he had also been over the strip in a wagon; that he had seen the lakes when they looked like one lake (Record, 398); that he had seen the water so near the Field house that one could step from the door into the water, or into a boat; that once he had tried to reach the house with a team, but found that he could not do so. (Record 398-9.)

Mrs. Farnsworth testified of having gone with Gardner and her sister to clean the house for Gardner in 1883; that she waded through the water, having taken off her shoes, to reach the house, and crossed the little channel on the bridge that was there. (Record, 402.)

Mrs. Minnie Langlotz was called at the hearing, as was also Mrs. Annie Neubeisser, by Mr. Shedd. The former testified that she had often seen the water extending over the strip between the two lakes, they being one lake; that the walk (road) from south to north across the cut (channel) was so far covered with water as to be impassable for walking. (Record, 361.)

Mrs. Neubeisser testified that for many years prior to 1874 she had lived with her father, Joseph Konyvesy, on the west side of Hyde Lake, on what is now known as the Rand and Steele property, it being west of the tract claimed by Konyvesy as pre-emptor under survey of 1874; that she now lives south of the cut south of Field's place; that she had seen the water extend over the low ground on both sides of the cut, south of Field's, many times, the water being almost always over a part of it; that she had seen the lakes when they looked like one

lake, and had crossed in a boat many times between the lakes. (Record, 357-60.)

August Neubeisser, a tenant of Mr. Shedd, living on section 29 south of Elm Island, gave like testimony to that of his wife. He had crossed in a boat south of the cut south of Field's, and had made such crossing also north of Field's. (Record, 343-7.)

A stipulation was filed July 8, 1892, that the judgments rendered by the Circuit Court of the United States for the Northern District of Illinois in *Mitchell* v. *Smale* and *Hardin* v. *Jordan* (ejectment cases), had, upon the application of the defendant in each case, been vacated and set aside under the provisions of the statutes of Illinois. (Record, 415.)

Said stipulation was filed after the hearing and while the case was under advisement in the Circuit Court of Cook County.

(*c.*) THE DECREE OF THE CIRCUIT COURT OF COOK COUNTY AUGUST 10, 1892, SUBSEQUENTLY REVERSED IN PART.

The Circuit Court of Cook County, by decree rendered August 10, 1892 (Record, 416), recited the consolidation of the two burnt records cases (*Shedd* v. *Thomas et al.*, 442 B. R., and *Shedd* v. *Fuller et al.*, 443 B. R.), and the hearing of the same on pleadings and evidence, oral, documentary and written.

The decree found, *inter alia*, the issuing of the patent October 1, 1855, to Stephen A. Douglas for "Fractional Section 29," aforesaid. That the right, title and interest acquired by said Douglas through the patent had been acquired by petitioner Shedd. That the public rec-

ords had been destroyed by fire on or about October 9, 1871, That patent from United States to Horatio B. DeWitt for southwest fractional quarter of fractional section 20 was issued March 1, 1850. That said Shedd, at the commencement of this proceeding, had acquired title to the premises through said patent.

That Gertrude H. Hardin became seized in fee simple of the premises for which the certificate of entry was issued to said John Holbrook December 24, 1838, upon which the patent was issued to said Holbrook May 20, 1841, the premises being described in the patent as the southeast fractional quarter and the east fraction of the southwest fractional quarter of section 19, and the northeast fractional quarter and the east fraction of the southeast fractional quarter of section 30, in township 37 north, range 15 east, in the district of lands subject to sale at Chicago, Illinois, according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general.

That the survey represented by said plat was made in the years 1834 and 1835. That according to said plat the southeast fractional quarter of section 19 and the northeast fractional quarter and the east fraction of the southeast fractional quarter of section 30 were situated on the borders of the lake designated on the plat "Navigable Lake," but which then was and is in fact a non-navigable lake. That said lake was meandered for the purpose of ascertaining the quantity of upland to be charged for, and not for the purpose of limiting the title of the patentees to the meander line, the lake or waters thereof constituting the boundary.

That said Gertrude H. Hardin traced title from William B. Egan under the patent issued to him August 1,

1853, for one of the tracts bounded by said lake in said plat, to wit, to that part of the west fraction of the south-east quarter of section 30 which was bounded on the west by a line running north and south at a distance of eighty rods east of and parallel with a line running north and south through the center of said section 30.

That prior to the survey by the United States the proprietary right to the lands in question and to the lake bed, and also to the lake itself, was in the United States. That after such survey the lands in said township were regularly brought into the market and disposed of in pursuance of the Acts of Congress in such case made and provided, according to the official plat of such survey, without any reservation on the part of the United States in respect to the lake bed, or any part of the same, and that said lake bed passed to the patentees or grantees from the United States, who thereupon became and were seized of all the proprietary rights to the extent of their interest in the said lands of the United States in respect to the lake or lake bed.

That the attempted survey of the lake bed in 1874 was unauthorized, and that the attempted conveyances thereof by patents based upon such survey were without authority of law and illegal and void. That such survey of 1874 was based upon the correctness of the survey of 1834-5, but was ordered on the theory that the meander line was a line of boundary, and that parts of the lake had become by the recession of the waters dry land and subject to cultivation, and that the United States owned the same. But the court found that the meander was not a line of boundary, and that the survey of 1874 was unauthorized.

That the patentees from the United States under the survey of 1834-5 of the lands bounded by the lake took to the center of the lake, ratably.

That both the patents to said Douglas and said DeWitt under which petitioner Shedd claimed, as well as the patents under which Gertrude H. Hardin claimed, were based upon a survey made by the United States in 1834 and 1835, and referred to a plat made from said survey which, with the Field Notes of the survey, showed the lake as a boundary.

That said lake in fact, and as shown by the plat, extended easterly beyond the state line between Indiana and Illinois into Indiana, and that a north and south line dividing it in the center would lie just east of the state line, which latter line was a little less than one mile east of the north and south section lines between sections 30 and 19, and sections 29 and 20.

That at the time of the government survey of 1834 and 1835 the point of land shown on the plat as the southwest fractional quarter of fractional section 20 extended in a southwesterly direction to the south line of said section.

That the ridge or point of land forming the northerly portion of fractional section 29 extended north and northeasterly to the north line of the southwest quarter of said section. That the east fraction of the southeast quarter of section 30 formed a part of this ridge, and extended to the north line of the south half of the southwest quarter of section 29.

That north of the north line of the south half of said section 29, up to the south line of said section 20, the land was at the time of the government survey of 1834 and 1835 covered by the water of the lake so that at that time there was there but one lake extending, as shown on the official plat, from the west line of the lake to the state line.

That the survey of 1874 was obtained upon affidavits untruly alleging that the bed of the lake was land fit for cultivation.

The decree proceeded (Record, 419) to pass upon the various claims setting up tax titles, and held the tax titles to be invalid, conditioning to some extent the decree of invalidity upon payment of taxes and legal costs.

The court (Record, 421) decreed that the petitioner Charles B. Shedd should recover all the land, whether submerged or not, in the said southwest fractional quarter of said fractional section 20, and the southeast fractional quarter of fractional section 19, in township 37 north, range 15 east of the third principal meridian, in Cook County, Illinois, which lies to the easterly of the middle line of the body of water commonly known as Hyde Lake, lying in part of said quarter sections and having been originally a bay of Wolf Lake, said line to be run, taking as a guide, so far as practicable, the meander line, as shown by the government survey of 1834 and 1835, and treating the same as a shore line by measurement from which said middle line is to be ascertained.

The title of said Shedd was by decree established, and he was adjudged to be seized thereof as of an indefeasible estate of inheritance, in fee simple, as well against all the parties to the cause as against all persons claiming or to claim under them, or either of them, or any of them, as against all the world.

It was further adjudged and decreed that said Shedd should have and recover all the land, whether submerged or not, in the south half of said fractional section 29, in township 37 north, of range 15 east of the third principal

meridian, in Cook County, Illinois, the north and south boundary lines of said tract being extended to the state line between Illinois and Indiana, and also all of the land, whether submerged or not, which would be included between the west line of the northwest quarter of the southwest quarter of said section 29, an east and west line run from the southwest corner of said quarter-quarter to the middle line of the bay to the west of said tract, the middle line of said bay, and another east and west line from the northwest corner of said quarter section to the middle line of said bay, being so much land, whether under water or not, as lies directly west of said northwest quarter of the southwest quarter of said section 29 and between that tract and the middle line of said bay, the meander line of the government survey of 1834 and 1835 to be used as a guide in establishing this middle line; and the title of said Shedd was established as aforesaid.

The court decreed that said Gertrude H. Hardin should have and recover the east fraction of the southwest fractional quarter and the southeast fractional quarter of section 19, aforesaid, and the northeast fractional quarter and the east fraction of the southeast fractional quarter of section 30, except the right of way through said southeast quarter of section 19 and northeast quarter of section 30, granted by said Gertrude H. Hardin and Isaac N. Hardin, her husband, to the South Chicago and Southern Railroad Company, by deed bearing date December 24, 1886, and recorded in the recorder's office of said county January 19, 1887, and also except a strip of land 400 feet wide to be taken from the south side of said section 19, according to a certain deed from said Gertrude H. Hardin and Isaac N. Hardin to the Cook County Canal and Dock Company, bearing date August

30, 1884, and except also so much of said southeast fractional quarter of section 19 as lies to the east of said middle line of Hyde Lake; and in fixing the extension into the lake of the tracts so owned by said Gertrude H. Hardin it was further considered, ordered, adjudged and decreed by the court that the said Gertrude H. Hardin should have, hold and recover, with the exception of said right of way and the said strip of 400 feet, all the land, whether submerged or not, which lies to the westerly of the middle line of the said bay of Wolf Lake between the southwest fractional quarter of section 20, and the southeast fractional quarter of section 19, such middle line to be surveyed or determined in the manner above stated, with reference to determining the westerly boundary of the southwest fractional quarter of section 20 as awarded to the petitioner Shedd as aforesaid. And the title of the Cook County Canal and Dock Company to said strip of 400 feet, as described in said deed to said company, was confirmed as a title in fee simple, said strip of 400 feet, however, being held to extend eastward only to the middle of the bay lying eastward of said southeast quarter of section 19, the easterly half of said bay being allotted to said Shedd by a line to be run to divide the same, as before provided in the decree.

Also the decree declared that said Gertrude H. Hardin should have and recover the northeast fractional quarter of section 30, in the township and range aforesaid, and that the same be held to embrace and include all the land, whether submerged or not, extending eastward from said congressional subdivision to the state line of Indiana, the lines of said quarter section originally bounding it on the north and south, respectively, being extended as the north and south boundary lines, respectively, of said tract to said state line.

Also, that the said Gertrude H. Hardin should have and recover all the lands, whether submerged or not, in the northeast quarter of the southeast quarter of section 30 aforesaid, lying west of the westerly line of the land awarded as aforesaid to said Shedd, as a part of the northwest quarter of the southwest quarter of section 29 aforesaid, and that said Gertrude H. Hardin should have and recover the southeast quarter of the southeast quarter of said section 30.

Also that the petitioner Shedd and cross-petitioner Gertrude H. Hardin should take and hold title to land under water awarded to them, respectively, subject to the right, if any, of shore owners upon said lakes to use in common the waters of said lake for purposes of fishing and boating, and similar usual and customary use, but that the right to cut ice in said lakes might be exercised only by owners of the bed of the lake over which such ice was formed; and no reservation was made in any manner to impair that right.

The several cross-petitions of John I. Bennett, Andrew Crawford, Elizabeth P. Thomas, Conrad N. Jordan, J. Ensign Fuller, Franklin A. Cleaveland, Frank I. Bennett, James W. Converse and Charles E. Rand were dismissed for want of equity.

Appeal was prayed and taken by Conrad N. Jordan, J. Ensign Fuller, John I. Bennett and Frank I. Bennett to the Supreme Court of Illinois. Also by consent the appeals were to be to the Supreme Court sitting in what was then the Central Grand Division of Illinois. (Record, 424.) Appeals to said Supreme Court were also prosecuted by Elizabeth P. Thomas, The South Chicago and Southern Railroad Company, Charles E. Rand and Franklin A. Cleaveland.

In the assignment of errors by Fuller, Jordan and others, it was alleged that the Circuit Court erred in finding that there was no reservation by the United States in respect to the lake bed. Also in finding that such lake bed passed to the patentees under the survey of 1834-5. Also in finding that the United States could not restrict the rights of such patentees after selling the lands according to said survey or the plat representing the same. Also that the court erred in holding that the survey of 1874 was void. Also that the court erred in decreeing that the patentees from the United States under the survey of 1834 and 1835 of lands bounded by the lake took to the center of the lake. Also the court erred in holding that the meander line was not a line of boundary. (Record, 425-6.)

(*d.*) Judgment was rendered by the Supreme Court of Illinois January 17, 1896, affirming the aforesaid decree in part and reversing the same in part, and remanding the cause to the Circuit Court for further proceedings as should to justice and law appertain. (Record, 426-7.)

(*e.*) The case having been thus remanded to the Circuit Court of Cook County, it was redocketed therein June 25, 1896, in pursuance of the remanding order. (Record, 429-30.)

When the cause further came on to be heard in the Circuit Court of Cook County, to wit, on the 16th of March, 1897, said Gertrude H. Hardin, by her counsel, suggested to the court that she wished to present further evidence upon the question left open for consideration by the decision of the Supreme Court of Illinois, and was prepared to show that since the entry of the original de-

cree from which appeal had been taken another trial of the ejectment suit of *Gertrude H. Hardin* v. *Conrad N. Jordan,* in the Circuit Court of the United States for the Northern District of Illinois, referred to in the pleadings herein, had occurred, and resulted in judgment as per transcript.

That she expected to show by testimony that said Shedd had, since the decision of the Supreme Court of Illinois, taken possession of part of the lands recovered by her by the judgment aforesaid in the Circuit Court of the United States.

That in determining the rights of the parties to accretions or relictions further testimony would be necessary with reference to artificial conditions for which said Shedd was responsible, and which tended to her injury upon the question, what was the extent of the land submerged? And she expected to show by such testimony that her tracts on the west shore of the lake represented in the plats were under the decision of the Supreme Court of Illinois to be bounded by the remaining part of the lake represented by said plat, there having been such recession of the waters from the west shore that her lands extended to the somewhat permanent waters near the line between the States of Indiana and Illinois.

That the testimony taken at the former hearing, prior to the entry of the decree, had not been directed especially to the question of extent of accretions or relictions, but had more especially pertained to the question raised by persons claiming under the survey of 1874, whether there were omitted lands, or lands which should be construed as having belonged to the United States after the issuing of the patents under the survey of 1834-5.

It was further suggested in the motion that injustice would be done said Gertrude H. Hardin if the conditions of the property at the time of the rendering of the former decree, or at the time of the filing of the petition by said Shedd, were alone to be considered upon the evidence taken before the rendering of said decree. With this motion was submitted a transcript of the said judgment in the Circuit Court of the United States, in *Hardin* v. *Jordan,* which judgment was rendered December 10, 1896. (Record, 433-4.)

In such judgment it was found that said Gertrude H. Hardin was entitled to recover possession of the premises described in the declaration, and was seized thereof in fee simple. That the original defendants (for whom as landlord Conrad N. Jordan was substituted) were, at the time of the commencement of the suit, in possession of the premises, or parts thereof, claiming an interest under a survey made in 1874, which the court held to have been unauthorized, and the premises so held adversely to the plaintiff were described as follows:

Lots 2 and 3 in the southeast quarter of section 19, lot 2 in the southwest quarter of section 20, the southeast quarter of the southwest quarter of section 20, the west half of the southwest quarter of section 20, lot 1 in the southeast quarter of section 20, lots 1 and 2 in the northeast quarter of section 29, the northwest quarter of section 29, the north half of the southwest quarter of section 29, the east half of the northeast quarter of section 30, lot 1 in the northeast quarter of section 30, the northeast quarter of the southeast quarter of section 30, lot 3 in the southeast quarter of section 30, all in township 37 north, range 15 east of the third principal meridian.

And the court found that the southeast fractional quarter of section 19, and the northeast fractional quarter of section 30 and the east fraction of the southeast fractional quarter of section 30, in the township and range aforesaid, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General, were bounded by or situated on a lake which was and is non-navigable, the principal part of which is now known as Wolf Lake, and that the said plaintiff, as owner in fee of said several tracts, had and has the rights of a riparian proprietor in respect to said lake, as represented on said plat, and that the seisin of the said plaintiff as to the two first named tracts last aforesaid extends to the center of Wolf Lake, the north and south lines of said tracts, respectively, being extended or carried to such center, excepting from the bounds thus inclosed, the fractional southwest quarter of fractional section 20, and also the southeast fractional quarter of said section 20, in said township and range, according to said official plat, and excepting also an extension of said last two mentioned tracts, respectively, westward to the center of the bay or part of said lake immediately west of each of said tracts, respectively, such extension of the second of said tracts having for its south boundary a line drawn westward from a point on the state line between the States of Indiana and Illinois, twenty-two chains and sixty-nine links south of the east and west center line of said section 20, according to said plat, and that the east fraction of the southeast fractional quarter of said section 30 extends to the middle of the bay or projection of the lake in front thereof.

It was also adjudged that the said Gertrude H. Hardin, plaintiff, should have a writ of possession for

the said tracts of land of which she was so seized, so extending into and to the center of said lake and bays, respectively, except as aforesaid, and thereby take, as to said several tracts so owned by her, the full rights of a riparian proprietor.

The certificate of evidence further states, among other things, that said Gertrude H. Hardin produced witnesses to show the extent of the accretions connected with and properly a part of the tracts of said Gertrude H. Hardin and the Cook County Canal and Dock Company, and the nature and extent of the recession of the waters of the lake, and to show that but a small part of the lake, to wit, a part near the line between Indiana and Illinois, and a part east of said line, remained a lake, the residue being accretions, and that so far as it was in Illinois it had but little depth or likelihood of permanence unless artificially sustained or protected, and had for some years been kept at an artificial elevation by the original petitioner Shedd, in order that ice might be taken therefrom at seasons for gathering ice, and that but for such artificial elevations the accretions, properly a part of the tracts belonging to Gertrude H. Hardin, would be increased in area, the extent of which increase would be approximately shown by the testimony ready to be offered and produced on the part of Gertrude H. Hardin.

That the court declined to receive such evidence or allow witnesses to be examined, as produced by the said Gertrude H. Hardin, and decided to take the case upon the evidence which was considered by the court in rendering the aforesaid decree of August 10, 1892. (Record, 435.)

DECREE IN CIRCUIT COURT OF COOK COUNTY, AUGUST 11, 1897.

(*f.*) In the decree rendered by the Circuit Court of Cook County, August 11, 1897, it was recited that the case was heard upon the proofs, oral, documentary and written, taken and heard originally in said case, that is to say, before the appeal of the same to the Supreme Court of Illinois. (Record, 437.)

There was a finding of title in petitioner Shedd under the patent of Stephen A. Douglas for fractional section 29 and the patent to Horatio B. DeWitt for the southwest fractional quarter of fractional section 20, and in Gertrude H. Hardin for the lands for which the patent was issued to John Holbrook, and for so much of the land for which the patent was issued to William B. Egan as lies east of the west half of southeast quarter of said section when of the full dimensions of eighty acres. That the survey of the aforesaid lands, according to the official plat of which the patents to said Douglas, DeWitt, Holbrook and Egan were issued, was made by authority of the United States in 1834 and 1835, and that all the tracts described in said patents, except the east fraction of southwest quarter of section 19, bordered and abutted upon certain lake or lakes designated on said official plat "Navigable Lake," but which was and is in fact a non-navigable lake or lakes. That the waters of the lake constituted and were the boundaries of such grants, but that the parties holding under such patents were riparian proprietors with reference to the waters and bed of said lake or lakes, and were entitled to claim and have all and singular the rights, privileges and interest incident and belonging thereto as such riparian proprietors.

That at the time of the survey of 1834 and 1835 and at the time the said tracts of land were respectively sold and patented by the United States, the submerged land of said lake or lakes, together with the waters thereof, to the extent that the same lay within the State of Illinois, was held and controlled by the State of Illinois, who alike had the benefit thereof in fishing, boating and the like, and that so long as such meandered lakes exist, the state exercised such control and held the same so in trust. But that the riparian owners were entitled to the rights incident to riparian proprietorship, including the right to accretions and relictions, and to follow the recession of waters to their edge.

That the aforesaid survey of 1874 of the bed of said lake or lakes was ordered and made upon the theory of the correctness of the survey of 1834 and 1835, and upon the false theory or supposition that the meander line of said survey of 1834 and 1835 was a line of boundary, and that parts of the lake had by recession of the waters become dry land and fit for cultivation, and that the title to the same was vested in the United States, and that the United States possessed right and power to sell and convey the same.

The patents issued under said survey of 1874 to Andrew Farrand, Alice Condit, Thomas C. Wilkerson, John White, Solomon Field, John E. Curtis, James W. Smith, Franklin A. Cleaveland, Chester B. Rushmore, were in conflict with the rights of persons claiming under the patents issued under the survey of 1834 and 1835. That said survey of 1874 was unauthorized and void, and that the various claims set up under the survey of 1874 and adverse to the rights of the patentees under the survey of 1834 and 1835 were invalid, illegal and void, and that

the defense under the Statute of Limitations was not sustained.

That the lake, as shown by the official plat of the survey of 1834 and 1835, and, as a matter of fact, extended easterly along the state line between Indiana and Illinois, and into the former state; that it was as shown by the said plat, and that the center would lie just east of the state line, which latter line is a little less than one mile east of the north and south section line on the east side of sections 30 and 19. (Record, 447.)

That from the northeast corner of the southwest quarter of said fractional section 20 there extended in a southerly direction a ridge. From the southeast corner of fractional southeast quarter of section 30 and the southwest corner of fractional section 29 a ridge extending in a northerly direction.

The extent to which this ridge projected from the north was about 220 rods, and the extent of the projection from the south was about 160 rods.

The width of these ridges varied, some places being twenty-eight rods wide and others wider, which was dry land at ordinary stages of water, still others narrower, and this was the case at the time of the original survey. Along these ridges, in their projections from the north and south, trees of different varieties grew, some of which were three feet in circumference. These points at their extremities were about eighty or ninety rods apart, and between these points and along the sides of the ridge and around the margin of the lake within its meandered line reeds and coarse grass grew in the water.

In the marshy depressions between these points were two islands, one a mere knoll, the other containing about one or two acres and on which trees and bushes grew, which islands passed under said patent of fractional section 29 to the grantee therein and have vested in petitioner Shedd.

That this was substantially the physical condition in ordinary stages of water at the time of the survey of 1834 and 1835, and the changes in the physical conditions thereof from that time to the year 1874 were not great—such as existed resulting from the slow filling of the lake bed and from other natural causes.

That since the year 1874, by reason of the improvement of the Calumet River and the wearing out of deeper natural channels from the lake, and an increased flow therefrom, and the same natural causes continuing to raise the bed of the lake, there has been a recession of the waters, causing dry land on both sides of the ridge; and around the borders of the lake the recession was such that between the meandered lines and the water there was uncovered (and the greater part of the year was dry land around the lake) a strip twenty or twenty-five rods wide, and the marshy depression between the two ridges of land above described has become permanent dry land, the width thereof at the date of the former decree varying from at least thirty-six rods to seventy rods; that said permanent land thus acquired became attached to the said ridges of land as accretions and by reason of such recession of the waters.

The court adjudged that said Charles B. Shedd should have and recover the possession of the said fractional southwest quarter of fractional section 20, and the said

fractional section 29, all in township 37 north of range 15 east of the third principal meridian, and the lands particularly described as follows, to wit:

Beginning at the northeast corner of said fractional southwest quarter of said fractional section 20, township 37 north, range 15 east of the third principal meridian, running thence south along the east line of said southwest fractional quarter of said fractional section 20 (and the extension thereof to the south) to the open waters of Wolf Lake; thence along with the open waters of Wolf Lake in a southerly or southwesterly direction to the south line (extended to the east) of the said fractional section 29; thence west along said line as extended and said south line of said section 29 to the north and south section line between sections 29 and 30 of said township and range; thence north along the line between said sections 29 and 30 and its extension to the north to a point identical with the northwest corner of the southwest quarter of said section 29, if said section were fully squared out and all its lines extended; thence from said point northwesterly to the waters of Hyde Lake, along a line drawn at an angle of forty degrees with a line drawn due east and west through or at said point; thence along with the waters of Hyde Lake in a northerly or northeasterly direction to the center east and west line (extended to the west) of section 20; thence east along said line as extended and along said line to the place of beginning.

Together with all and singular the riparian rights and privileges and benefits incident to the position and location of said described tract or tracts of land with reference to the lakes as aforesaid, and the title of the petitioner Charles B. Shedd to said described tract, tracts

and parcels of land is hereby established and declared and confirmed, and he is hereby adjudged and decreed by the court to be seized thereof as of an indefeasible estate of inheritance in fee simple, as well against all the parties hereto, and all persons claiming or to claim under them, or either or any of them, as against all the world. And it is further ordered, adjudged and decreed by the court that all the defendants to the petition and amended petitions of the said Charles B. Shedd and all parties in possession of said lands or any part thereof so awarded to him as aforesaid, do forthwith surrender possession thereof to him, said Charles B. Shedd.

Also that said Gertrude H. Hardin should have and recover the possession of the said east fraction of the southwest fractional quarter of said fractional section 19, in township 37 north of range 15 east of the third principal meridian, together with all and singular the riparian rights and privileges and benefits incident to the position and location of said described tract or parcel of land with reference to the Calumet River as aforesaid.

Also that said Gertrude H. Hardin should have and recover the possession of the said southeast fractional quarter of section 19, township 37 north of range 15 east of the third principal meridian, and also the northeast fractional quarter and the east fraction of the south east fractional quarter of section 30, and that part of the west fraction of the southeast fractional quarter of section 30 which lies east of a line running north and south at a distance of eighty rods from the north and south center line of said section, all in the township and range aforesaid. The said tracts known as the southeast fractional quarter of section 19 and the northeast fractional quarter of section 30 are hereby held to embrace and in-

clude all the land on the west side of the open waters of Hyde Lake south of a line extended due east from the center of section 19 to the open waters of said lake, and north of a line drawn due east from the center of said section 30 to the open waters of said lake, said tracts extending to the open waters of said lake, excepting from the property herein described, a strip of land 400 feet wide, in the southeast quarter of section 19 hereinafter awarded to the Cook County Canal and Dock Company.

And the said Gertrude H. Hardin, as owner of the tracts and lands so found to be held by her, should have all and singular the riparian rights and privileges and benefits incident to the position and location of said several tracts or parcels of land with reference to said lake.

The tract known as the east fraction of the southeast fractional quarter of section 30, with that part of the west fraction of the southeast quarter of section 30, which lies east of a line drawn north and south at a distance of eighty rods east from the north and south center line of said section 30, is hereby held to embrace and include land bounded as follows:

Beginning at the southeast corner of said section 30; thence running north to the north-west corner of the south-west quarter of section 29 aforesaid, if squared out; thence northwest at an angle of forty degrees along a line fixed herein (as a boundary for property of Charles B. Shedd as described herein) to the open waters of said Hyde Lake; thence along said open waters following the same towards or to the north line of the southeast quarter of said Section 30, if fully squared out, and extending along said waters or in a direct line from said open waters to said line (if such extension be necessary to

complete boundaries), to the north line of the southeast quarter of Section 30 aforesaid, if fully squared out, and thence extending upon and along said line to a line running north and south at a distance of eighty rods east from the north and south center line of said Section 30 to the south line of said Section 30 if extended; thence east on said line to the place of beginning; so as to embrace the land southwest of said line so run at an angle of 40 degrees, and all of said southeast quarter of said Section 30, if squared out, east of said line running north and south eighty rods east from the north and south center line of said section.

Also that the said Gertrude H. Hardin, as owner of the tract and lands so found to be held by her, should have all and singular the riparian rights and privileges and benefits incident to the position and location of said several tracts or parcels of land with reference to said lake.

It was also adjudged that the Cook County Canal and Dock Company should have and recover a strip of land 400 feet wide, to be taken off of the south side of the southeast quarter of said fractional section 19, running the whole length east and west of said quarter section, and extending eastward to the waters of Hyde Lake (excepting, however, the right of way of the Calumet River Railway Company), together with all the riparian rights, privileges and benefits incident to the position and location of said tract or parcel of land, with reference to the lake aforesaid, subject to the exception aforesaid.

Exception in respect to lands awarded Gertrude H. Hardin and the Cook County Canal and Dock Company was made of a right of way in the Calumet River Rail-

way Company under a certain conveyance to the South Chicago and Southern Railroad Company.

Appeal from the decree last aforesaid to the Supreme Court of Illinois was taken by Gertrude H. Hardin and the Cook County Canal and Dock Company. (Record, 453.)

It was assigned as error that the Circuit Court erred in refusing to hear and receive further testimony.

Also in holding that the title to any of the lands, whether submerged or unsubmerged, was in the State of Illinois, and in refusing to give due effect to the patents through which appellants respectively deraigned title.

Also that said court erred in the division or apportionment of land or accretions.

Also that the court erred in awarding to said Shedd an undue quantity or proportion of such lands or accretions.

Also that said court erred in not following or observing the riparian rights of said appellants, respectively, in respect to the present or existing Wolf Lake, and in refusing to allow them, respectively , any frontage thereon.

Also that said court erred in not awarding or apportioning to the appellants, respectively, a due or proper quantity of their proportions of the lands or accretions.

Also that the basis or principle on which the decree proceeded in declaring divisional lines was contrary to the law and the equity of the case.

Also that the decree was uncertain as to boundaries given and otherwise unjust.

(*g.*) Judgment was rendered by the Supreme Court of Illinois December 6, 1898, affirming the aforesaid decree of the Circuit Court of Cook County, Illinois, rendered August 11, 1897.

(*h.*) A stipulation was made between counsel as to the making up of the record for this court.

The stipulation provided, among other things, that the opinions of Judge Tuley, written and oral, at the first hearing of the Circuit Court of Cook County, Illinois, and the opinion of said judge written or made up and sent to the Supreme Court at the second hearing, and the opinion of Judge Seaman on the hearing of an application for the stay or control to some extent of the writ of possession in *Hardin* v. *Jordan,* in the Circuit Court of the United States, should be made an appendix to the brief of counsel for plaintiff in error in this court. (Record, 458.)

SPECIFICATION OF ERRORS RELIED UPON HERE.

1. That the Supreme Court of Illinois erred in denying and refusing to give effect to the right, title and privilege, respectively, set up and claimed by the plaintiffs in error, severally and respectively, through or under the entries at the United States Land Office by John Holbrook and William B. Egan, respectively, and through or under the patents from the United States to the said Holbrook and Egan, respectively.

2. That the court unduly limited, restricted and abridged such right, title and privilege so set up or claimed when the entries and patents were respectively of land on or covering in part a non-navigable lake.

3. That the judgment ought to have been for the plaintiffs in error, respectively, that they were, as claimed by them, owners of the submerged lands to the center of the lake.

4. That the court erred in holding that said plaintiffs in error, respectively, were owners only to the water's edge.

5. That the court erred in holding that the meandering by the surveyor or deputy surveyor of the lake gave the State of Illinois rights and control in the premises to the impairment of the rights of appellants as owners of the submerged portions of their lands.

6. That the court erred in fixing the time for determining the limits or boundaries of the lands, not regarding the situation or condition thereof as represented by the official plat of the survey of the same returned to the General Land Office, but adjudging that the limits or boundaries in the matter of the several tracts would be according as accretions (so-called) had formed at an arbitrary date.

7. That the court erred in awarding an undue portion of the former submerged lands to the said Charles B. Shedd, and an inadequate portion to the plaintiffs in error, respectively, contrary to the claim made by the said plaintiffs in error, respectively, under the laws of the United States.

8. That the court erred in not following the decision of this court as to the construction and effect in respect to the lake bed of the patent titles from the United States set up and claimed by the plaintiffs in error.

9. There was error in the affirmance by the Supreme Court of Illinois of the decree of the Circuit Court of

Cook County of August 11, 1897, in that said Circuit Court in rendering said decree had refused to receive further evidence of the final judgment which before that time, to wit: on the 10th day of December, 1896, had been rendered in favor of *Gertrude H. Hardin* v. *Conrad N. Jordan,* in the Circuit Court of the United States for the Northern District of Illinois, whereby it was adjudged that said Gertrude H. Hardin was entitled to recover, and did recover, the lands which had been patented to the said John Holbrook, and which lands said judgment further found extended, as to a part thereof, to the center of Wolf Lake, and as to one tract thereof extended to the middle of the bay or projection of the lake in front of the same (Record, 432); and that the said Circuit Court of Cook County had, to the prejudice of the present plaintiffs in error, confined the case to the testimony taken at the first or former hearing, and had declined to receive or hear further testimony as to the actual extent of accretions or relictions, or "the extent of the land submerged." (Record, 432.)

(The thirty-fifth rule of this court is not supposed to be applicable to this case of error to the Supreme Court of a state, but only to cases of appeal or writs of error in cases taken from the District Court or Circuit Court direct to this court, under Section 5 of an Act entitled "An Act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891; hence the addition of Assignment 9 to the enumeration of errors as presented at pages 8 and 9 of the Record; this assignment being intended to take the place of the one so printed which was sent to this court by the clerk of the Supreme Court of Illinois with the transcript of the record.)

BRIEF.

THIS COURT HAS JURISDICTION TO REVIEW THE DECREE OR JUDGMENT OF THE STATE COURT. (REV. STAT. U. S., § 709.)

The case in the State Court did not reach the stage at which a writ of error could be sued out under said section until a final judgment was rendered by the Supreme Court of Illinois, affirming a decree denying the claim set up as existing under the laws of the United States.

The judgment of the Supreme Court of the state in the first instance, being one of reversal in part, but remanding the case for further proceedings, was not a final judgment subject to be reviewed here. *McComb* v. *Co. Coms. of Knox Co.*, 91 U. S. (1 Otto), 1.

Until the final decision of the Supreme Court of the state the decree did not become reviewable here. *Fisher* v. *Perkins* (*or Carrico, Admr.*), 122 U. S., 522; (30 Law. Ed., 1192).

Claim of proprietorship in fee simple in the lake bed under the patents from the United States was distinctly made in and by the pleadings in the Circuit Court of Cook County, Illinois. (Record, 30-1, 42-45, 48.) Such claim was predicated upon the fact that the proprietary right to the lands in question, and to the lake bed, and as to the lake itself, was in the first instance in the United States.

It was averred in support of this claim, that when the survey of the public lands was extended over the fractional township in which the lake was situated, and the

lands were regularly brought into market in pursuance of the Acts of Congress in such case provided, and when those bordering upon the body of water represented on the plat of the survey as a "lake" were sold and granted by the United States according to such plat, without any reservation on the part of the United States in respect to the lake bed, or any part of the same, such lake bed passed to the patentees or grantees from the United States. It was further claimed that thereupon the patentees or grantees from the United States, and their assigns, became and were seized of all the proprietary right in respect to the lake and lake bed which had previously been in the United States, and were so seized of the same in fee simple.

This claim was recognized in the decree originally rendered in the Circuit Court of Cook County (Record, 416-424); but upon appeals taken by parties not now before the court, but who claimed under a survey and subdivision of the lake bed made in 1874, the Supreme Court of Illinois reversed said decree in part, and held that because the lake was meandered in the public surveys, its bed or the submerged lands within the same, did not pass to the patentees (Record, 478-9), but that such patentees took only to the water's edge.

The argument of the court in reversing the original decree was that although the lake was non-navigable, yet because it was meandered, the same principle should be applied to it as is applied to Lake Michigan; and therefore that the patentees took only to the water's edge, with a riparian interest (or littoral right) under which they were entitled to the benefit of accretions to their lands. (Record, 481.)

When the Supreme Court of the state thus decided, it remanded the cause to the Circuit Court of Cook County, Illinois, for further proceedings in conformity with the opinion, the effect of such opinion being to deny the proprietorship of the patentees or their assigns in any of the lands formerly submerged or constituting a part of the non-navigable lake, save only those which might be considered accretions. It was therefore necessary to await a rehearing in the court of original jurisdiction to which the case was so remanded, that is to say, the case did not become ripe for review in this court until a final decision thereof was reached.

Davis v. *Crouch*, 94 U. S., 514.
Fisher v. *Carrico* (*or Perkins*), *supra.*

Because the judgment of the Supreme Court of the state, as rendered in the first instance, was one of reversal, with a remanding order, but without specific directions for a decree, it became necessary to have further proceedings; and therefore there was not at that stage a final judgment in the suit. (Phillips' U. S. Sup. Ct. Prac., 206; *McComb* v. *Co. Coms. of Knox Co., supra.*)

But the judgment became final for the purpose of a writ of error from this court to the Supreme Court of Illinois, when the further proceedings resulted in the affirmance by that court of a decree supposed to embody the views expressed in the opinion remanding the case.

Fisher v. *Perkins* (*or Carrico*), *supra.*

THE CLAIM OF TITLE IN FEE TO THE SUBMERGED LANDS UNDER THE PATENTS FROM THE UNITED STATES HAVING BEEN DENIED BY THE STATE COURTS, THIS COURT HAS JURISDICTION TO REVISE THE DECREE.

Lessee of Pollard's Heirs v. *Kibbe*, 14 Pet., 353.
Mitchell v. *Smale*, 140 U. S., 406.
Shively v. *Bowlby*, 152 U. S., 1.

As was remarked in the opinion of this court in *Hardin* v. *Jordan*, 140 U. S., 371, "the question is as to the effect of that (the patent) title to the lake and the bed of the lake in front of the lands actually described in the grant."

There is revisory power here; and it is especially the province of this court, in such a case, to determine "the kind of title conferred by patent" under an Act of Congress, under which the lands were sold and conveyed. Lender v. *Kidder*, 23 Ill., 49.

II.

FULL TITLE AND PROPRIETORSHIP OF THE LAKE AND OF THE SUBMERGED LANDS THEREIN WAS IN THE FIRST INSTANCE IN THE UNITED STATES.

The Act of Virginia of October 20, 1783, and the deed of cession made thereunder on the 1st of March, 1784, gave full right of domain to the United States. (1 *Kent's Com.*, *258, 259.)

Angell on Waters, § 6, as to grants of territory carry-

ing with them a right of property in waters within the boundaries of the grants.

> "Over the public domain within a state, and the innavigable streams and lakes situated thereon, the United States has * * * the rights of a proprietor. * * * Also an innavigable stream or lake lying within the public domain is a part and parcel of the land itself, inseparably annexed to the soil, and as such passes to the patentee of the soil from the United States." *Pomeroy on Riparian Rights,* p. 46, Par. 32.

The title of Virginia prior to the making of the Deed of Cession to the United States was certainly as great as was that of William Penn under the grant to him; of which grant it was said in *Coovert* v. *O'Conner,* 8 Watts, 470, 477:

> "All rivers, lakes and streams comprehended within the charter bounds of the province, passed to William Penn in the same manner as the soil."

By the cession from Virginia "the United States obtained all the land and the title thereto, not previously granted."

> *President, etc., of Commons* v. *McClure,* 167 Ill., 23, 35.

As the court remarked in that case (*ib.,* 37), the perfect title of all the lands embraced in the Deed of Cession, aside from the possessions, the title of which was stipulated, "was ceded by Virginia to the United States."

The comprehensiveness of the proprietary rights of Virginia until it made the Deed of Cession, and of the United States thereafter until the state was organized, and thenceforth as to all unsold lands and non-navigable

waters, will appear when we observe how great had been the rights of the crown prior to the grant to Virginia.

> "The right of the King extends over all lands, as well such as are covered with water, as such as are not."
>
> *Rogers* v. *Jones,* 1 Wendell, *237, 256.

It was in the power of the crown to grant land and water, and even to include the right of fishing in navigable waters. (*Ib.*)

To a like effect is *Roe* v. *Strong,* 107 N. Y., 350.

On the admission of a state into the Union it acquires an interest in navigable waters; and such waters are in this respect distinguishable from those which are not navigable.

> *Cobb* v. *Davenport,* 3 Vroom (N. J.), 369.
> *Kanouse* v. *Slockbower,* 48 N. J. Eq., 42.

As to the latter, the state, when claiming title, must show a direct grant from the United States. No proprietary right or title to non-navigable waters passed to the State of Illinois upon its admission into the Union, save only under an actual cession to it by the United States.

But the state, as an incident to its sovereignty, and taking the same footing in this regard as the original states, acquired dominion over the navigable waters, as was declared in

> *Martin* v. *Waddell,* 16 Pet., 410, and
> *Pollard* v. *Hagan,* 3 Howard, 212, and in the more recent case of
> *I. C. R. R. Co.* v. *The People,* 146 U. S., 387.

The two former of those cases related to lands under tide waters. The last named case related to lands covered by Lake Michigan, which lake had been held by this court, and also by the State Courts, to be like a great sea; and this court, by Mr. Justice FIELD, said:

> "We hold * * * that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the great lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under the tide waters on the borders of the sea, and that the lands are held by the same rights in the one case as in the other, and subject to the same trusts and limitations."

III.

A DISTINCTION BETWEEN NAVIGABLE WATERS AND THOSE WHICH ARE NOT NAVIGABLE IN LAW OR IN FACT SHOULD NOT BE LOST SIGHT OF IN THIS CASE; FOR WE HAVE TO DEAL WITH A NON-NAVIGABLE BODY OF WATER.

The distinction has been observed in the acts of Congress. Rev. Stat. U. S., § § 2476. 5251.

Kirkpatrick v. *Yates Ice Co.*, 45 Mo. App., 335, states the correct doctrine on this subject.

As the lake was in fact non-navigable, did it pass to the state, in the public surveys, because the deputy surveyor meandered it?

Issue is taken with the State Court on that question.

What part of the public domain passed to the State of Illinois on its admission into the Union?

On the admission of Illinois into the Union it did not

take title to non-navigable bodies of water within its limits, nor did the United States hold these in trust for the state as it had held the navigable bodies of water.

When the State of Illinois applied for admission into the Union an ordinance was passed by that state accepting certain propositions made by Congress the 18th of April, 1818, by what is usually called the Enabling Act. (Rev. Stat. of Ill., Hurd, 1899, p. 27.) Under the first of such propositions Section 16 in every township, or in certain cases an equivalent, was to be granted to the state for the use of the inhabitants of such townships for the use of schools. The second and third of such propositions related to Salt Springs, which the state was to be allowed to manage, and provided for an appropriation of five per cent. of the net proceeds of the lands lying within the state, which percentage of such net proceeds was in part to be disposed of under the direction of Congress in making roads leading into the state, and partly to be appropriated by the Legislature of the state for the encouragement of learning. A fourth proposition provided that the President of the United States might designate thirty-six sections, or one entire township, to be designated by the President as being reserved that the same might be vested in the state for the use of a seminary of learning.

But otherwise than as was provided in said Act of Congress, and the ordinance accepting the same, the state acquired no title to any of the lands within its limits.

It would follow that a principle declared in Article 4 of the Ordinance of July 13, 1787, for the government of the territory of the United States north-west of the

Ohio, was tacitly recognized or affirmed by the state when it came into the Union.

That principle was that the Legislature of the state should never

> *"interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may (might) find necessary for securing the title in such soil to the bona fide purchasers."*

It is not intended to maintain that the Ordinance of 1787 remained in force after the admission of the State of Illinois into the Union. For the principle relied upon, affirming the absolute proprietary right of the United States, is predicated on other grounds.

The proprietorship of the United States was so full and complete that nothing which could be done by the State Legislature could interfere therewith. Much less could a court of the state contravene the right or power of the United States. As was stated by Mr. Chief Justice MARSHALL in *Johnson* v. *McIntosh*, 8 Wheat., 543, 586, the Deeds of Cession to the United States, including the Deed from Virginia, "ceded the soil as well as jurisdiction to the United States."

No limitation affecting full proprietorship was expressed in the Deed of Cession from Virginia, nor was such proprietorship as to any private waters relinquished by the United States in any manner by the admission of the State of Illinois into the Union. Indeed, the provisions of the aforesaid ordinance of Illinois fully recognized such proprietorship.

Nor was any land belonging to the United States to be disposed of, except by the authority of Congress. This

follows from a provision of the Constitution of the United States, Art. IV, § 3, Par. 2, giving the Congress power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

As was announced by this court in *Gibson* v. *Chouteau*, 13 Wall., 92:

> "*The power of Congress in the disposal of the public domain cannot be interfered with, nor its exercise embarrassed by any state legislation.*" * * *

The court remarked:

> "*With respect to the public domain the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations.* * * * *No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.*"

In the same case it was declared that:

> "The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. * * * The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance."

So it was held in *Irvine* v. *Marshall,* 20 How., 558, that:

> "All the lands in the territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the government may deem most advantageous."

Also, that:

> "A territory cannot, by its law, interpose and dictate to the United States, to whom, and in what mode, and by what title, the public lands shall be conveyed."

The court, by Mr. Justice DANIEL, remarked:

> "The system adopted for the disposition of the public lands * * * is peculiarly and exclusively the exercise of a Federal power. The theater of its accomplishment, the evidences or muniments of right it bestows, are all the work of Federal functionaries alone."

In *Wilcox* v. *Jackson,* 13 Pet., 498, counsel had argued at the bar that:

> "The State of Illinois had a right to declare by law that a title derived from the United States, which by their laws is only inchoate and imperfect (as, for example, resting on a pre-emption), shall be deemed as perfect a title as if a patent had issued from the United States."

But the court held that:

> "Whenever the question in any court, State or Federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States."

In *Bagnell* v. *Broderick*, 13 Pet., 436, the court, speaking by Mr. Justice CATRON, said:

> "Congress has the sole power to consider the dignity and effect of titles emanating from the United States."

Paige v. *Peters*, 70 Wis., 178, 182, fully adopts the doctrine,

> "that whenever the question in any court, State or Federal, is whether a title to land, once the property of the United States, has passed, that question must be resolved by the laws of the United States,"

citing

Wilcox v. *McConnell*, 13 Pet., 516, 517.
Irvine v. *Marshall*, 20 How., 564.
Gibson v. *Chouteau*, 13 Wall., 92.
Seymour v. *Landers*, 3 Dillon, 440, 441,

and Mr. Justice CASSODY said:

> "Upon such a question the decisions of the Supreme Court of the United States are, of course, binding upon the State Courts."

In *Gilmore* v. *Sapp.*, 100 Ill., 297, 303, presenting a question when a patent became effective, the court said of a decision of this court, there noticed:

> "As this decision relates to a construction of an Act of Congress, it is authoritative and binding on all other tribunals."

In the case before us it will be for the court to declare again what was the purpose or effect of the meandering of the lake; the Supreme Court of Illinois, in its opinion, differing from this court on that subject.

The running of a meander may have been appropriate enough, but it was certainly not intended either by the surveyor or the Commissioner of the General Land Office to divest the United States of proprietorship.

That it did not divest the United States of title will appear from various considerations.

It was not in the power of the General Assembly of the state by its Fishery Laws or otherwise to impair the efficacy of the grants from the United States, any more than it was within the power of the Legislature of Minnesota to say that the lake bed should be held in common or in joint ownership when in fact the patents gave rights in severalty.

Shell v. *Matteson,* 81 Minn., 38.

The case is cited as illustrative. The State of Illinois in establishing a Fish Commission, as it did in 1879, never intended to appropriate any non-navigable lakes or waters to its own use.

IV.

NO EFFECT ADVERSE TO FULL PROPRIETORSHIP UNDER THE PATENTS FROM THE UNITED STATES, SHOULD HAVE REEN GIVEN TO THE MERE FACT THAT THE LAKE WAS MEANDERED.

The Supreme Court of Illinois, in its decision of this case, held that meandered lakes, though non-navigable, are within the control of the state, and subject to be treated just as if they were public waters or non-navigable waters . But the court gave a significance to the meander which is inconsistent with the laws of the United States in respect to the survey and sale of the public lands.

The opinion of Mr. Justice PHILLIPS in the present case may be said to have conceded substantially, that the title to the lake bed or to the lake was originally in the

United States. Such at least would be an inference from the argument contained in the opinion.

Fuller v. *Shedd*, 161 Ill., 462.

The question was stated by Mr. Justice PHILLIPS, in the opinion in that case, to be,

> "whether the riparian owner of the lands meandered on a lake by the original survey takes to the water's edge as meandered, or takes to the center of the lake."

Proceeding towards a decision of that question, the learned justice denied the force of the objections made to the survey of 1834-5. He disagreed with the contention that there was any obvious mistake or fraud in the survey; and in this respect agreed with the decisions previously made by this court. But the reasoning of his honor was in other respects peculiar.

For (1), he held that while the grant by patent of the land on a river in Illinois would give title to the middle thread of the current, there was not the same reason for construing a grant of land on a meandered lake as extending to the center of the lake. Why was the distinction made? He assigned as a reason that,

> "The irregular borders of a lake would render the determination of lines in the bed of the lake between riparian proprietors of almost impossible solution." (*Ib.*, 483.)

And, again (2), reviewing some cases on this subject, beginning with certain of them which were not based on the common law, but were governed by other considerations, or by ordinances passed while title was in the colony and before many sales had occurred, the learned justice proceeded to say:

> "A principle applied to a large lake is a principle applicable to a smaller one. This principle applies

> to such as are meandered in the original survey." (*Ib.*, 489.)

The court thereupon concluded that the view taken by this court as to what was the common law rule would not be recognized; but that the view which had been expressed in *Trustees of Schools* v. *Schroll,* 120 Ill., 509, was the law of Illinois, and should be taken to be "the common law."

The learned justice would treat this non-navigable lake as if it had all the characteristics of a navigable water, even one like Lake Michigan. Assigning it first to the class of non-navigable waters, he treats it as a navigable lake.

Yet, and this is to be marked as an inconsistency, the court then took up the question whether the lake bed passed to the state under the Swamp Land Act.

Why, as we may ask, would his honor do so, after having put the lake in the class of public waters because it was meandered? He remarked:

> "Prior to 1850 there were many lakes similar to those in this record referred to, in many of the states, which induced the passage of the Swamp Land Act, with the amendments."

He then suggested, in substance, that whilst that act operated as a grant *in praesenti,* yet it was a question for the decision of the secretary of the interior whether a particular tract was swamp land; and it being found from the record that at a hearing before the Land Officers, under the supervision of the General Land Office, and of the department of the interior, the claim made by the state and by the County of Cook to these lands as swamp lands was rejected, the determination by the offi-

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cers of the United States was held to be conclusive on the parties, except in a direct proceeding. Hence, it was determined that the County of Cook had no claim on the lands in this case; and further, that the survey of the lake bed was without any right on the part of the Commissioner of the General Land Office to make such survey. The reason for the latter determination was that:

> "Riparian proprietorship is a property right of value, and to it are attached rights and privileges conferred by law, of which the owner cannot be deprived by an illegal proceeding."

Now, if the submerged lands had belonged to the state by reason of the lake having been meandered, there was no occasion for considering the question whether they passed by the Swamp Land Grant. The only logical reason for taking up the question was that the title thereto had been in the United States, and must have gone to the patentees under the survey of 1834-5, or to the state under one or the other of the grants of September 20, 1850, and September 28, 1850, *supra*. For if the title was in the United States, there was necessity for the passage of one of those acts (Record, 92, 93), to transfer or convey such title to the state. But the state did not then, or at any time since, so far as is known, claim title to any lake bed lands because of the meander of the lake, or for any other reason than because of the grants by the said Acts of Congress, or one of them.

Many small non-navigable lakes in the State of Illinois, as we suppose is the case elsewhere, were meandered; but in no other case has any claim been made in behalf of the state as arising from the fact of such meander.

In this particular, an observation made by Mr. Justice BRADLEY in the opinion of the court in *Mitchell* v. *Smale, supra,* is to be noticed. In language quoted by the Supreme Court of the state (Record, 473-4), he said:

> "Nor do we mean to say that in granting land bordering on a non-navigable lake or stream the authorities might not formerly, by express words, have limited the granted premises to the water's edge and reserved the right to survey and grant out the lake or river bottom to other parties. *But since the grant to the respective states of all swamps and overflowed lands therein this cannot be done.*"

The Acts of Congress concerning public lands and the survey thereof made no provision in terms for meandering streams or bodies of water.

In the subdivision of a township into sections, the marking of three outer corners of each quarter section seems to have been necessary. (Record, 388.) The surveyor was to note in his field books the true situation

> " * * * of all water courses over which the line he runs may pass, and also the quality of the lands." (Act of May 18, 1796, § 2; Rev. Stat U. S., § 2395.)

He was to return his field books to the Surveyor General, who was to cause therefrom a description of the whole land surveyed to be made out and transmitted to the officers who might superintend the sales. Such Surveyor General was to cause a fair plat to be made of the townships and fractional townships, describing the subdivisions thereof, and the marks of the corners.

The making of the plat would necessitate the estimation of the areas of fractions especially, and the notes of a meander of either lake or river would facilitate the making of the estimate. *But such meander did not oper-*

ate either as a reservation by the United States, or on the other hand as a grant to the state.

The plat was to be recorded, and a copy of it was to be kept open at the Surveyor General's office for public information, and other copies were to be sent to the places of sale and to the General Land Office.

The survey of 1834-5 was undoubtedly regular, and in accordance with the law.

The Supreme Court of Illinois, in all its decisions on the subject, at least up to the time of the decision of this case, has been in accord with this court in treating the meander of a body of water in the government surveys as having been run, not as a limitation upon boundaries, but for showing the water as a boundary, and ascertaining quantities approximately.

Meander lines, said Mr. Justice CLIFFORD, in *St. Paul & P. R. Co.* v. *Schurmeier*, 74 U. S. (7 Wall.), 272, Book 19 Law. Ed., 74, are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of a tract, but for the purpose * * * of ascertaining the quantity of land in the fraction subject to sale and which is to be paid for by the purchaser."

In *Middleton* v. *Pritchard*, 3 Scam., 510, the court declared:

> "The meandering is for the purpose of ascertaining the quality of land,"

and that view of the law has been taken, in a long line of cases, including:

Houck v. *Yates*, 82 Ill., 179, and
Fuller v. *Dauphin*, 124 Ill., 542.

And, as this court remarked in *Hardin* v. *Jordan, supra,* it has never been held that the lands under water in front of grants (by the United States) are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees.

V.

IT WAS NOT IN THE POWER OF THE SURVEYORS WHO RAN THE MEANDER AND RETURNED THEIR FIELD BOOKS TO THE SURVEYOR GENERAL TO PUT THE LAKE IN THE POSITION OF A PUBLIC WATER BY MEANDERING THE SAME; NOR WAS IT IN THE POWER OF THE SURVEYOR GENERAL IN MAKING THE PLAT, TO MAKE THE LAKE A NAVIGABLE BODY OF WATER BY CALLING IT "NAVIGABLE LAKE" AS TO THE ILLINOIS PORTION.

(ON THE PLAT OF THE PART OF IT IN INDIANA IT WAS ONLY DESIGNATED AS "LAKE.")

NEITHER THE ACT OF RUNNING THE MEANDER, NOR THE DESIGNATION ON THE PLAT OF THE LAKE ITSELF, COULD MAKE THE LAKE OTHERWISE THAN A NON-NAVIGABLE LAKE; IT BEING, IN FACT, AS THE COURTS HAVE ALL FOUND, NON-NAVIGABLE. THE FACTS AS TO THE CHARACTER OF THE BODY OF WATER CHARACTERIZED IT, OR PLACED IT IN THE CATEGORY OF NON-NAVIGABLE. THE DESIGNATION WHICH HAPPENED TO BE GIVEN IT ON THE PLAT WAS BUT FANCIFUL OR ACCIDENTAL, AND DID NOT BAR INQUIRY AS TO THE FACTS; NOR, ON THE OTHER HAND, SHOULD THE SURVEYOR'S MEANDER TAKE THE LAKE FROM THE CLASS PROPERLY KNOWN AS PRIVATE WATERS AND PERPETUALLY ASSIGN IT TO THE CLASS OF PUBLIC WATERS.

MOREOVER, THE DECISION OF THE CONTEST IN THE LAND OFFICE DISPOSED OF THE CLAIMS OF THE STATE.

A long litigation is displayed by the record. It has included contests in the Land Offices, local and general. Its theater was transferred from the State Courts to the Federal Courts by claimants under the survey of 1874; and two decisions in regard to it were made in this court in 1891; to one of which decisions one of the present plaintiffs in error was a party, and to the other of which (*Mitchell* v. *Smale, supra*), defendant in error Shedd was a party, prosecuting the writ of error therein, though in the name of his grantor, Mitchell. The courts of Illinois were also, as we have seen, called upon later to make an expression, especially as to the contest resulting from the survey of the lake bed, and they sustained the original government survey; but chose to put an interpretation upon the rights of the patentees under that survey different from that which had been given by this court, and suggested as a reason for so doing that the lake represented by the plat was meandered in such survey.

But no magical effect should be given to the meander; and when we find that it was a lake which was meandered, we should recognize the fact, which has been clearly shown, that it was a non-navigable inland water which was meandered; a water which, with the submerged land under it, belonged at the time to the United States; a water which was in no manner reserved by the patent; a water, therefore, which, as was remarked by Mr. Justice BREWER, in *Niles* v. *Cedar Point Club*, 175 U. S., 300, 308, is "generally the property of riparian owners."

As the court there held, in respect to the State of Ohio, it might be enough to say here that the State of Illinois, having in a contest in the Land Office claimed under the Acts of September 20, 1850, and September 28, 1850, *supra,* respectively; and its claim having been denied, no such claim should be litigated in this suit; and for this reason it was an error in the Supreme Court of Illinois to hold that the state was entitled to the submerged lands because the lake was meandered.

The State of Illinois, both for itself and under the Swamp Land Grant, appeared in the contest in the Land Office in the present instance. (Record, 92, 105.)

The judgment of the Land Department upon the matter *"was that of a special tribunal, and unassailable except by direct proceedings for its annulment."*

> *Steel* v. *St. Louis Smelting & Mining Co.,* 106 U. S., 447; (27 Law. Ed., 226).

It concluded the state, not only as to the claims it explicitly made, but also as to any it might have made in the contest. For, as was held in *Dowell* v. *Applegate,* 152 U. S., 327 (38 Law. Ed., 463, 470):

> *"A judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been set up."*

But when the state constantly taxed the lake bed lands, as the record shows it did, it conceded private ownership thereof. (Record, 419-421, 444- 5.)

VI.

THE DISTINCTION BETWEEN PUBLIC WATERS AND THOSE WHICH ARE PRIVATE DOES NOT REST UPON THE ACTION OR NON-ACTION OF A MINISTERIAL OFFICER CONNECTED WITH PUBLIC SURVEYS. IT IS NOT IN THE POWER OF A DEPUTY SURVEYOR OF THE UNITED STATES, NOR OF ANY OFFICER CONNECTED WITH THE SURVEYS, NOR, INDEED, OF ANY BRANCH OF THE EXECUTIVE DEPARTMENT, TO DETERMINE THAT A NON-NAVIGABLE LAKE IS, OR SHOULD BE TREATED AS, A PUBLIC WATER. THE QUESTION WHETHER AN INLAND OR NON-TIDAL BODY OF WATER IS NAVIGABLE IS A QUESTION OF FACT; A POSITION ILLUSTRATED BY

Healy v. *Joliet & Chicago R. R. Co.*, 116 U. S., 191.
Hubbard v. *Bell*, 54 Ill., 110.

In *Rice* v. *Ruddiman*, 10 Mich., 125, the court did not consider that Muskegon Lake, which had an outlet into Lake Michigan (p. 137, *id.*), and was affected by the rise or fall of the latter, was subject to be treated as a part of or in character like Lake Michigan. On the contrary, it was held to be subject to private ownership, in respect to submerged lands within the lake limits; an ownership, however, which, as in the case of rivers, was "subordinate to the paramount right of navigation, and such other public rights as may be incident thereto." (*Ib.*, 140.)

The tidal waters are by the common law public. There are also waters which, under the Acts of Congress, are navigable, when the same are in fact navigable. Some

were by the ordinance of 1787 to be highways; for the ordinance declared that:

> "The navigable waters leading into the Mississippi and the St. Lawrence and the carrying places between the same shall be common highways and forever free, etc." (Art. IV of said ordinance.)

Congress, following the principles of the ordinance, declared (Rev. Stat. U. S., § 2476):

> "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both."

But there is a material distinction between public waters, or such as are navigable by law or in fact, and such as are not navigable. The distinction is frequently important in the construction of grants of lands having waters as boundaries. The question naturally arises, what interest had the grantor in the soil under the water? Did his boundary fall at the line of high water or low water on the sea shore or on a tidal water? If a navigable water was a part of his boundary, what, if any, title had he to the soil under the water; or, if his lands were on a non-navigable water, how far therein did his boundary extend?

It would be an error to suppose that this court has held that the question, how a grant by the United States of land bordering upon non-navigable waters should be construed, will be left to each state to determine for itself. No decision to that effect has been made by this court. If there has been an impression that this court has sanctioned a doctrine that the State Courts, respectively, may each one for itself determine whether the proprietary in-

terest originally in the United States as to the bed of non-navigable streams or waters passes under a government patent for land bordering on such waters, such impression is erroneous. Such reach of decision has not been allowed to the State Courts in such cases, nor can they deprive the patentee of his right to the fee according to common law principles, where these have prevailed, or should prevail, as to non-navigable waters in the public domain of the North-western territories and the states formed therefrom.

The doctrine laid down by this court in *Packer* v. *Bird*, 137 U. S., 661 (34 Law. Ed., 819), still prevails; but it continues to be applicable only to navigable waters, to such as are navigable in fact, including the great rivers made public highways by Congress. There it was stated that it is undoubtedly the

> "rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that where the waters of the rivers are affected by the tides, the title of such owners is limited to the ordinary high-water mark."

The court said that a different test from that which was applied in England to "determine the navigability of our rivers, with the consequent rights both to the public and the riparian owner," was proper; such test being found in their navigable capacity.

> "Those rivers are regarded as public rivers in law which are navigable in fact, * * * navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

From the cases which have been decided by this court, beginning with *Genesee Chief* v. *Fitzhugh,* 12 How., 443, the term "navigable waters" of the country has come to be fairly well understood.

As was held in *Barney* v. *Keokuk,* 94 U. S., 324 (24 Law. Ed., 224), citing certain preceding cases of this court, to wit:

Martin v. *Waddell,* 16 Pet., 367;
Pollard v. *Hagan,* 3 How., 212.
Goodtitle v. *Kibbe,* 9 How., 471.

relating to tide waters, enunciated "principles which are equally applicable to all navigable waters"; and it was declared by this court,

> "that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are in the strictest sense entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction."

The court therefore said:

> "There seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending, if it could extend, its survey and grants beyond the limits of high water."

This court, therefore, in the case of *Barney* v. *Keokuk, supra,* agreed with the determination of the Circuit Court of the United States for the District of Iowa, and in doing so followed certain Iowa cases, enunciating the doctrine that the title of the riparian proprietor in a particular case of land "on the banks of the Mississippi River, extends only to high-water mark," and that "the shore

between high and low-water mark, as well as the bed of the river, belongs to the state."

The court also said:

> "This is also the common law with regard to navigable waters; although in England no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so, and especially it is true with regard to the Mississippi and its principal branches."

In *St. Paul & Pac. R. R. Co.* v. *Schurmeier, supra,* the distinction between streams navigable and those not navigable was especially considered, and Mr. Justice CLIFFORD, in delivering the opinion of the court, said:

> "Proprietors bordering on streams not navigable, unless restricted by the terms of their grant, hold to the center of the stream."

But further:

> "Many Acts of Congress have provided that all navigable rivers or streams in the territory of the United States offered for sale shall be deemed to be and remain public highways." (Quoting certain statutes.)

The learned justice also remarked:

> "It is quite clear that Congress did not employ the words 'navigable' and 'not navigable' in the common law sense, but in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership shall apply to lands bordering on the latter, but the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways."

It was said, on the authority of *Dutton* v. *Strong,* 1 Black, 23, that although such riparian proprietors (hav-

ing lands on navigable waters) are limited to the stream; "still they also have the same right to construct suitable landings and wharves for the convenience of commerce and navigation as is accorded proprietors bordering on navigable waters affected by the ebb and flow of the tide."

When the Congress suggested the distinction between navigable rivers and those not navigable, or as in the Act of March 3, 1811, put navigable rivers and waters in the former territories of Orleans and Louisiana in a class by themselves as public highways, the courts might reasonably notice the distinction. It was appropriate, too, because of geographical conditions being different here from those in England. Therefore it may be said to have been proper for the courts to adopt the enlarged meaning of the word "navigable," or the more comprehensive meaning suggested by Congress; and consequently it might well be concluded, as Mr. Justice CLIFFORD, in the Schurmeier case, *supra*, suggested, that Congress,

> "in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways."

Congress led the way in recognizing an enlargement of meaning of the word "navigable." Therefore, the courts have in some states treated the beds of navigable rivers therein as being held by such states in their sovereign capacity, because of the feature of navigability, like as if they were navigable at common law, which claim on the part of such states this court has not denied. Why? The answer is because such waters being navigable in

fact, may in this regard well be so treated, especially in cases in which the bordering lands have passed into private ownership. However, in language used by the court in *Barney* v. *Keokuk, supra:*

> "If they (the states) choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."

But very great is the difference when non-navigable waters are to be considered, in cases in which the states could get these only by direct grant. Without such grant they should not despoil the proprietors of their common law rights therein, nor can they properly limit such rights in any of the essential features of ownership.

It might well be said that if Congress had not legislated in the manner noted, the states could not have claimed in their sovereign capacity, and independently of grants, the navigable rivers above the ebb and flow of the tide.

In *Packer* v. *Bird,* 137 U. S., 661 (34 Law. Ed., 819), the River Sacramento was found to be a navigable river, one of the great rivers of California. The court noticed the Act of Congress of May 18, 1796, in which it was declared that:

> "All navigable rivers within the territory to be disposed of by virtue of the Act shall be deemed to be and remain public highways; and that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall become common to both."

So the court affirmed the judgment of the Supreme Court of California, bounding the lands of the plaintiff on the Sacramento River, and not including therein an

island which was the subject of controversy, and which would, as is supposed, have been included with the plaintiff's lands if such lands had been allowed to extend to the middle of the stream; such decision being supposed to be in accordance with common law principles, giving, however, the word "navigable" its full significance as applied in the Acts of Congress, and as adapted to this country.

But it is to be remarked that no intimation was given in any of the cases reviewed that the common law had been changed by Acts of Congress applicable to the interior waters of the country not navigable. No surrender to the states of the beds of the same could follow from any correct application of the common law to the grants of the United States in disposing of the public lands according to the Acts of Congress. The distinction drawn by the Acts of Congress would itself forbid any application to such interior non-navigable waters of principles which pertain to navigable waters alone.

The public lands of the United States bordering on interior waters that are not navigable, would have been of comparatively little value if such waters had passed to the states, respectively, by virtue of their sovereignty; and innumerable difficulties as to boundaries, and from conflicting claims on the part of settlers, would have arisen.

As was said by Mr. Justice BRADLEY, in *Hardin* v. *Jordan, supra:*

> "When land is bounded by a lake or pond, the water, equally as in the case of a river, is appurtenant to it. It constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring

it. Hence, the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water."

Where the courts of the states, as, for instance, in the State of Iowa, and the State of California, recognized the enlarged definition of navigable waters given by Congress, and thereunder limited the rights of riparian owners to high-water mark, allowing such owners the privileges of wharfing and the like, this court gave its sanction in construing grants within those states, but "subject to the condition that their (the states') rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee."

This court, however, declared, in *Packer* v. *Bird*, *supra:*

> *"The courts of the United States will construe the grants of the general government, without reference to the rules of construction adopted by the states for their grants."*

This court only allowed a voice to the states in view of the action of Congress, sanctioning a claim of sovereignty in a state over navigable waters (navigable in fact); therefore, allowing such states to construe grants of bordering lands on navigable rivers as extending but to low water or high-water mark, or equally allowing other states to follow the common law as to all waters, navigable and non-navigable alike.

There was but little, if any, occasion for the Swamp Land Act, granting "Swamp and Overflowed Lands," if the swamp and overflowed lands belonged to the states when within meandered streams or bodies of water; many such streams and bodies of water having remained unaffected by sales or grants made by the Government prior to the passage of the Swamp Land Act.

As to the interior non-navigable bodies of water which belonged to the United States and constituted a part of the public domain, it was never intended that the extent of the grants according to common law principles should be subject to be determined by the states; one state claiming by virtue of its sovereignty the ownership of the beds of such bodies of water, and another state following the principles of the common law and allowing the grant to extend to the center of the body of water. One common rule was applicable to the government grants of lands bounded by non-navigable waters, inclusive of the small interior lakes not navigable; and no departure from the common law as to grants of such lands can properly be asserted as having been in the mind of Congress in any Act relative to the public lands.

As was stated by Mr. Justice BRADLEY, in *Hardin* v. *Jordan, supra:*

> "A lake or pond, like a river, is a concrete object, a unit, and when named as a boundary, the natural inference is that the middle line of it is intended, that is, the line equidistant from the line on either side."

Holding to the view that the interpretation of a grant by the general government of lands on interior non-navigable waters is left ultimately to the decision of this court, it is submitted that the patentee of lands bounded by such waters, wherever such lands are situated, in the North-west territory, is entitled to full common law rights, not subject to be defeated by the decisions of a State Court, assuming for the state a sovereignty as to such waters, or declaring that the policy of the state should give the state a title not granted to it by any competent authority.

As was said in *Lux* v. *Haggin*, 69 Cal., 255:

> " * * * There is no public policy which can empower the courts to disregard the law, or, because of an asserted benefit to many persons (in itself doubtful), to overthrow the settled law."

And again, said the court in that case:

> "This court has no power to legislate, especially none to legislate in such manner as to deprive citizens of their vested rights."
>
> (10 Pac. Rep., 697.)

VII.

THE PRESUMPTION IS IN ORDINARY CASES THAT A DEED FOR A TRACT HAVING WATER FRONTAGE CONVEYS AS FAR AS THE GRANTOR OWNS.

As was stated by Mr. Justice GRAY, in *Paine* v. *Woods*, 108 Mass., 160-169:

> "The general rule of construction of all grants of land bounded by water of any kind is now well established, that, unless qualified by restrictive words, they pass the soil towards the center of the water as far as the grantor owns."

Recognition of that principle has been usual in the Illinois cases. It was applied in *Trustees of Schools* v. *Schroll, supra,* in holding the title to be in the Trustees of Schools *to a part of Meredosia Lake under a grant from the United States;* and so in the case of *Bristol* v. *County of Carroll*, 95 Ill., 84, recognition of the title of the County of Carroll to a part of a meandered lake was given as coming under the Swamp Land Grant.

As was said in *Hogg* v. *Beerman*, 41 Ohio St., 81:

> "A proprietor may convey all his rights to a grantee, unless forbidden by some law to which he is subject. *No one not possessed of some right in*

the thing granted should be heard in objection. Where the grantor is the government, the thing granted government property held by absolute title, and no use of the thing granted to which the public is entitled is taken away, we see no reason for denying to the grantee ownership of the thing granted."

Middleton v. *Pritchard, supra,* is authority not only as to the reason why the surveyor's meander was not to be considered a boundary, but also for the proposition that:

"Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it."

(S. C., 38 Am. Dec., 113.)

An express exception in the grant, or something equivalent to it, is usually necessary to limit the grantee to the edge of the water, when the grantor, having title to the water, or the submerged land thereunder, conveys lands with the water as a boundary.

3 Kent's Com., *428.

Elphinstone on Interpretation of Deeds, 182-3.

VIII.

THE SUPREME COURT OF ILLINOIS COULD NOT PROPERLY PLACE A NON-NAVIGABLE LAKE IN THE LIST OF NAVIGABLE WATERS. IT SHOULD HAVE BEEN TREATED THROUGHOUT, AND CONSISTENTLY, AS NON-NAVIGABLE.

The principal reason assigned for treating it as a public water, to wit: that it was meandered, was considered in *Shell* v. *Matteson,* 81 Minn., 38 (83 N. W., 491), and it was there held that the owners of lands bordering on

the shore of such a lake owned the bed thereof, their title extending to the center; and that an act of the State Legislature declaring that the shore owners should hold the bed of such lakes in common, and providing for so dividing the same was "an invasion of private rights," and was unconstitutional.

It might not appear with much certainty, from reading the opinion of the court by Mr. Justice PHILLIPS, in the case under review, that the court intended to say that the title to the lake bed was ever in the State of Illinois, either by reason of the lake having been meandered or otherwise. Expressions in the opinion are quite inconsistent with that view. Some of these have been noted, especially in following up the inquiry by the court whether the state took title under certain Acts of Congress; from which inquiry it was found that the state did not take title, and also that the state was in that regard concluded, for the purposes of this case, by the decision adverse to it in the Land Office. Yet it would seem that because of the supposed difficulty in making a division of the lake bed between the owners of land bounded by the lake, and because of a supposed policy of the state, indicated by certain steps taken in recent years, it is said,

> "to stock its waters, both lakes and streams, with fish, as a means of giving cheap and valuable food to its citizens,"

a small lake when meandered would, in the opinion of the court, be subject to be treated like the Great Lakes, including Lake Michigan. In connection with that announcement, the court used language deprecating the idea that

> "the small non-navigable lakes should become the private waters of riparian owners, * * * with exclusive rights thereon of boating, fishing and the like."

The court seemed to forget that certain incidents would be applicable to non-navigable waters, as well as to those which are navigable, and that the police power of the state might be applied to any such waters, as is shown, for example, by *Parker* v. *The People,* 111 Ill., 581, as to a river. But the same principle was adopted as to a lake in *People* v. *Bridges,* 142 Ill., 30, reviewing the decisions in various states, and citing approvingly *Beckman* v. *Kreamer,* 43 Ill., 447, noticed later.

The decree of the Circuit Court of Cook County had itself made provision amply protective of the rights of the shore owners in common in the matter of fishing and boating. (Record, 424.)

All rivers in Illinois, including that part of the Mississippi River which is within the state limits, are subject to private ownership of the bed, the adjoining proprietors taking to the middle thread of the stream. This is so as to the rivers which were meandered. All of these which are navigable, in fact, are subject to the public easement as to navigation, and as to fishing, boating and the like, their waters are vastly more important than are those of the inland lakes of the state.

The official plat of the survey of 1834-5 shows that the "Little Kalamick" River was meandered as well as the lake. But did such meander signify a reservation or a surrender to the state of its bed? Or did it make any difference with the rights of persons who became patentees of lands abutting on the river? Certainly not, as will be seen from *Washington Ice Co.* v. *Shortall,* 101 Ill., 46. So in *Canal Trustees* v. *Haven,* 5 Gilman, 548, a grant from the United States to the State of Illinois of the school section was held to include the bed of the

Des Plaines River running through the same, although the river was meandered in the public survey.

Reasons for private ownership of the beds of the streams in this state were forcibly stated in the case of *Braxon* v. *Bressler*, 64 Ill., 488.

In *City of Chicago* v. *Laflin*, 49 Ill., 172, the court held that the meander of Chicago River did not operate as a reservation by the United States, and that a grantee from the United States of a lot bordering on that navigable stream took ownership to its center or middle thread, subject to the public easement of passing over the stream as a highway.

Calumet River Ry. Co. v. *Sheaff*, 164 Ill., 453, decided in 1897, was more in accord with the views of this court in *Hardin* v. *Jordan* and *Mitchell* v. *Smale, supra*, the decree as affirmed showing that the title passed from the United States to the patentee Stephen A. Douglas, in respect to the submerged or lake bed portion of one of the tracts which was within or a part of the lake in question here under the survey of 1834-5. In that case the court did not require the petitioners holding title under a patent from the United States, according to the plat of the survey, to show that the land claimed by them consisted of accretions, nor that the lake (which is now under consideration) had dried up.

The final decree in this case asserted title in a measure with power of control in the state (Rec., 439-40), and such decree now under review here, was affirmed in 177 Ill., 128 (Rec., 484).

But in *Hammond* v. *Shepard*, 186 Ill., 235, the court distinctly announced that shore owners on meandered lakes take title only to the water's edge, the title to the bed of the lake being in the state.

The last named case involved a part of Sunfish Lake, in Township 24 North, Range 4 East, Carroll County, Illinois. This is the same lake which was referred to in *Bristol* v. *County of Carroll, infra,* the part of which was involved in the latter case, being in the next township south, namely, in Township 23 North, Range 4 East. The portion of lake in both townships was meandered.

Map No. 13 herein is a copy of the government plat of the original survey in Township 24.

The portion of the island involved in the Hammond case is a fraction, 3.39 acres, in what would be the east half of the northwest quarter of Section 31 if a full eighty acre subdivision; and the claim of Shepard was of the east half of the northwest quarter of Section 31, partly under the limitation laws, because of color of title and payment of taxes and possession. (P. 241 of 186 Ill.) The court held that the evidence was insufficient to take away from the state its title to the former bed of the lake, and therefore that Shepard, the plaintiff in the ejectment, had shown himself to be entitled to recover only the 3.39 acres, the evidence as to accretions thereto being imperfect.

As against the state, if it held title, the defense of a bar by limitation could not have been availing and such defense was considered in the case. But it would seem that the patent for the 3.39 acres was to Funk, as Drainage Commissioner, acting, of course, under the Illinois Act of June 22, 1852. (Sess. Laws of Ill., 1852, p. 178, Scates' Comp., 1148, *et seq.*) Limitation laws might have been applied to the county under a suitable state of facts; so it is a query whether the court considered the state as a party in interest as to the

MAP No. 13.

Lake
Island
Sec. 30
Sec. 31
Sec.
64
79
39
39.96
39.97
19.98
38.05
40.00
40.00
26.72
40.00
43.43
20.20
44.85
50.77
58.57
30.50
34.46
80.00
60.15
12.00
Ac 10.42
Ac 76.44
Ac 14.2
Ac 10365
50.34
28.00

supposed lake bed, that is, a party having had an interest in its sovereign capacity.

The case illustrates an anomalous position in which to put the state, if it be supposed that the court intended to hold that the state had title by right of sovereignty in respect to a part of the lake because it was meandered, when in fact, as appears from *Bristol* v. *County of Carroll, infra*, the state took title under the Swamp Land Grant.

The proprietorship must, from such instances, seem to be very ambulatory.

The strong announcement made by the court in the Hammond-Shepard case may be taken as indicating the construction intended to be put by the court on its ruling in this case.

However, when Mr. Justice WILKIN stated in the *Hammond-Shepard* case (186 Ill., 241):

> "The law of this state, as repeatedly announced, is, that shore owners on meandered lakes, whether navigable or non-navigable, take title only to the water's edge, the bed of the lake being in the state,"

he could only have referred to *Trustees of Schools* v. *Schroll, supra*, and the present case (under the title of *Fuller* v. *Shedd*), as speaking directly on the subject, but in neither instance speaking with anything like the significance which he supposed.

IX.

UNTIL THE TIME OF THE DECISION OF THE PRESENT CASE THE SUPREME COURT OF ILLINOIS RECOGNIZED THE ORIGINAL PROPRIETORSHIP OF THE UNITED STATES OF INLAND LAKES, AND DID NOT HOLD THAT THOSE OF THEM WHICH WERE MEANDERED IN THE PUBLIC SURVEY PASSED THEREBY TO THE STATE OF ILLINOIS.

Beckman v. *Kreamer, supra,* was decided in 1867. It was mentioned in *Hardin* v. *Jordan, supra,* as indicating the view of the Supreme Court of Illinois as to the common law, or as showing the doctrine that a principle under the law of boundaries that governed in respect to the rivers in the state applied to the inland lakes as well.

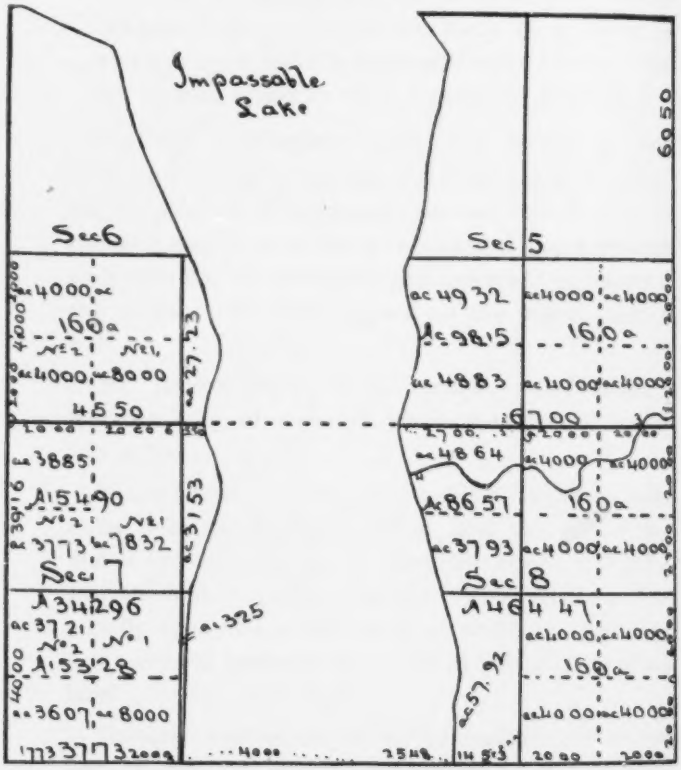
Mr. Justice Breese, in his opinion, stated distinctly that the body of water to which the decision applied was a lake.

It was found, as a fact, that it was a lake about seven miles from the Kankakee River; and the further fact that it had an outlet to the Kankakee River, still left it with the rank or quality of a lake. The decision was especially applicable to that body of water as a lake, and was a general statement of the law of Illinois as to inland lakes.

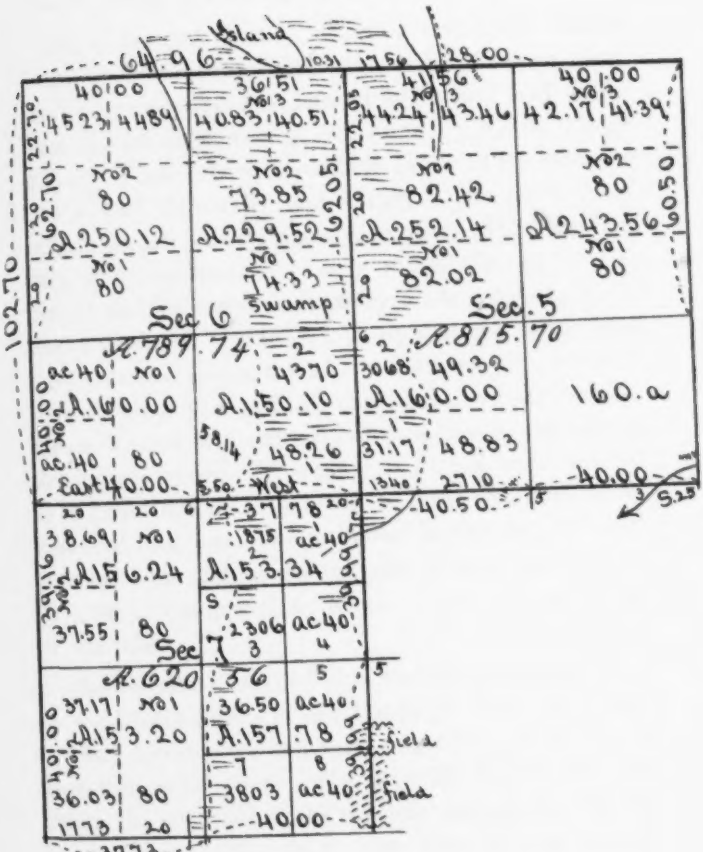
The case was not subject to the qualifications or conjectural questions which were applied to it in deciding the present case (161 Ill., 489).

Bristol v. *County of Carroll,* 95 Ill., 84, indicates, when carefully considered, that the court was not inclined to depart from the doctrine as to boundaries declared in *Beckman* v. *Kreamer, supra.*

MAP No. 12.


Impassable Lake
Sec 6
Sec 5
Sec 7
Sec 8
160a
160a
160a
160a
ac 4000
ac 8000
ac 4850
ac 3885
ac 3153
ac 3773
ac 7832
ac 3721
ac 3607
ac 8000
ac 325
ac 4932
ac 9815
ac 4883
ac 6700
ac 4864
ac 8657
ac 3793
ac 4000
ac 4447
ac 5792
ac 2548
ac 1453
ac 2000
ac 3200

MAP No. 15.


Leland
64
96
1031
1756
28.00
40.00
36.51
41.56
40.00
45.23
44.84
40.83
40.51
44.24
43.46
42.17
41.39
No 2
80
73.85
82.42
80
No 1
80
74.33
Swamp
82.02
See 6
See 5
A. 250.12
A. 229.52
A. 252.14
A. 243.56
A. 789.74
A. 815.70
ac. 40
No 1
4370
3068
49.32
A. 160.00
A. 150.10
A. 160.00
160.a
ac. 40
80
48.26
31.17
48.83
East 40.00
West
1340
2710
40.00
40.50
S. 25
38.69
No 1
1875
ac. 40
A. 156.24
A. 153.34
37.55
80
See 7
2306
ac. 40
A. 620.56
37.17
No 1
36.50
ac. 40
A. 153.20
A. 157.78
field
36.03
80
3803
ac. 40
field
1773
20
40.00
3773

The case involved the title to a part of certain lots situated within what was originally represented on the plat of the government survey of 1834 as "Impassable Lake." (Map No. 12 herein shows this survey.)

The County of Carroll, claiming under the Swamp Land Act of September 28, 1850, *supra*, brought ejectment to recover the west half of lots 1 and 2 of northwest quarter of Section 5, Township 23 North, Range 4 East. These lots were partially inside of the meander of the lake shown by that survey. The government made a second survey, namely, in July, 1850, and January, 1851, of sections 5, 6, 7 and 8 (*Ib.*, 89). The plat of the last mentioned survey made reference to "a line of meanders." (*Ib.*, 91.) By that survey the lines were extended across the lake in sections 5, 6, 7 and 8, thus, as already suggested, subdividing or sectionizing a part of what was represented as a lake in the plat of the former survey. Thereafter the lands were selected as swamp lands under said act, and the selections being approved, the lots were included in the list of lands passing to the state under the said Swamp Land Grant. (*Ib.*, 88.) (Map No. 15 herein shows the subdivision of the lake.)

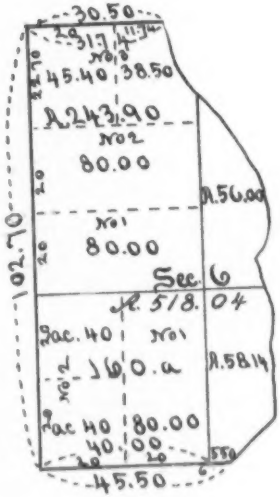
The defendant claimed title through a patent issued by the United States to one Daniel St. Ores, November 1, 1855, covering the east half of said lots 1 and 2. The case then stood thus: The plaintiff, the county, had title to the west half of the two lots, through the Swamp Land Grant. (*Ib.*, 89.) The title of the county was the earlier title in point of time, and the court held that while "a deed bounded on a highway, *prima facie*, carries the title of the grantee to the center of the road on the assumption that the grantor owns it" (*Ib.*, 91);

yet that the United States not having in fact owned the west half of said lots at the time of the issuing of the patent to St. Ores for the east half of the same lots, the claim set up by the defendants that there was *"a lake upon which their lands were bounded on the west, and whereby (wherefore) they took to the center of the lake,"* was not sustained by the evidence, as the government plat showed that when St. Ores purchased at the Land Office the east half of lots 1 and 2, the west half of said lots had been granted by the government, to wit, by the Swamp Land Grant. (*Ib.*, 91.)

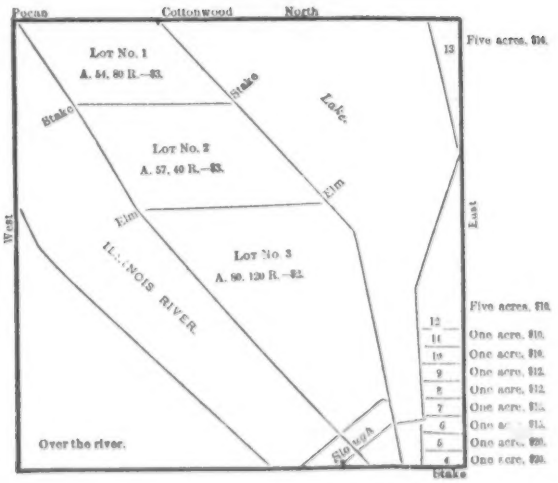
There was no attempt in the case to maintain that the lake passed to the state because of having been meandered, nor was there any intimation that if the land purchased by St. Ores from the government had at the time of his purchase been shown on the plat as being bounded by a lake, unsubdivided by the government, and remaining unsold or unaffected by the Swamp Land Grant, the claim of extension to the center of the lake would have been denied by the court.

It seems that there were meanders of the lake by the government surveyors at different times, in some of the earlier of which the lake was represented to be larger than under the later ones, and lands were brought into market as government lands which were within lake limits under meanders which had been previously adopted or approved. (Map No. 14 herein shows one of such surveys.) In no instance was the meander considered as a concession or relinquishment of title by the United States. The case shows also that if the doctrine that the title passed to the State of Illinois by the surveyor's meander be maintained, there would be a part of the lake which would be public, but other parts which

MAP No. 14.


30.50
2.0
31.7
11.3
45.40
38.50
A.24
31.90
80.00
A.56.00
80.00
See 6
A. 518.04
Sec. 40
160.a
A.58.14
Sec 40
80.00
40.00
45.50
102.70
Inaccessible Lake.

MAP No. 11.


Pecan
Cottonwood
North
Lot No. 1
A. 54, 80 R.—83.
Stake
Stake
Lake.
13
Five acres, $10.
Lot No. 2
A. 57, 40 R.—83.
Elm
Elm
West
East
Lot No. 3
A. 80, 120 R.—82.
ILLINOIS RIVER.
Five acres, $10.
12
11
10
9
8
7
6
5
4
One acre, $10.
One acre, $10.
One acre, $12.
One acre, $12.
One acre, $15.
One acre, $15.
One acre, $20.
One acre, $20.
Over the river.
Stake
Stake

would be private, depending on the question whether the government chose, before selling border lands, to make a resurvey or to sectionize parts originally meandered. A part of the lake as meandered was in the adjoining township on the north.

That lake probably illustrates the anomalous and contradictory conditions suggested, of public and private ownership upon the same body of water, from supposed right of sovereignty because of meander as to a part, and as to another part from the state taking title through the Swamp Land Act! (See map No. 13 *ante* of part of the lake in township 24 north, range 4 east.)

This court took careful notice of *Trustees of Schools* v. *Schroll, supra,* in deciding *Hardin* v. *Jordan, supra,* and said, among other things:

> "We cannot divest ourselves of the impression that the opinion of the court in that case on the subject in hand is anomalous and opposed to the entire course of previous decisions in the state."

This court further remarked:

> "It is our judgment that the law of Illinois in this regard is the common law, and nothing else; and the opinion of the court in *Trustees of Schools* v. *Schroll,* is not in accordance with common law."

(Map No. 11 herein is a copy of the map shown in 120 Illinois Reports of the subdivision by trustees of schools of section 16.)

This court further remarked that the court in that case

> "declared that there was no proof to show that the lots conveyed bordered on the lake or stream;"

also that

> "the lots were conveyed by a plat, and that did not show that they were situated on the lake."

It was also remarked by this court that the Supreme Court of the state, without being required to do so,

> "undertook to lay down the law as to rights of grantees of lands bordering on lakes and ponds as distinguished from running streams, holding to the Massachusetts doctrine that such waters belonged to the state, and are held for the use of the public, and do not pass to the riparian proprietors."

It was rightly suggested by this court that

> "nearly all of the authorities referred to in support of this decision (last named) are decisions of the courts of Massachusetts, and of other New England states which follow their lead, the court not adverting to the fact that the law of Massachusetts stands on a peculiar colonial ordinance adopted more than two centuries ago."

It was borne in mind that:

> "The grant of public lands of the United States carries with it the common law rights to an innavigable stream thereon, unless the waters are expressly or impliedly reserved by the terms of the patents, or of a statute granting the land, or unless they are reserved by the congressional legislation authorizing the patent or other muniment of title." (*Ib.*, 10 Pac. Rep., 720.)

The highest authorities on the subject were consulted, including *Bristow* v. *Cormican*, L. R. (H. L.), 3 App. Cas., 641, which, as Mr. Justice Bradley remarked, received the consideration of the best legal minds of England. Not the least among such authorities was *Smith* v. *Rochester*, 92 N. Y., 463, in which, Mr. Justice Bradley remarked, Chief Justice Ruger exhibited a careful and able examination of the law on the subject.

As was partly outlined in the opinion by Mr. Justice Bradley, *supra*, it will appear that in the States of New

York, New Jersey, Ohio, Indiana, Michigan and Minnesota, the general principles of the common law as announced by this court in *Hardin* v. *Jordan, supra,* and *Mitchell* v. *Smale, supra,* are fully recognized. The following, among other cases so holding, and to be noted for thoroughness may be added to those enumerated by Mr. Justice Bradley, namely:

Gouverneur v. *Natl. Ice Co.,* 134 N. Y., 355; 18 Law. Rep. An., 695.

Lamprey v. *The State,* 52 Minn., 181; 18 Law. Rep. An., 670.

Kirkpatrick v. *Yates, supra,* 45 Mo. App., 335.

Grand Rapids Ice Co. v. *S. Grand Rapids Ice Co.,* 102 Mich., 227; S. C., 25 Law. Rep. An., 815.

Olson v. *Huntamer,* 6 S. Dak., 364.

Shell v. *Matteson,* 81 Minn., 38.

Kanouse v. *Slockbower, supra,* holds to the same principle.

While *Calumet River Ry. Co.* v. *Sheaff, supra,* is stated in the opinion therein to have been decided on the authority of the present case in the same court, yet the decree in the case followed, or was based upon, the decision of this court in *Hardin* v. *Jordan, supra.*

The opinions in *Hardin* v. *Jordan, supra,* and *Mitchell* v. *Smale, supra,* were so thorough that they may well stand by themselves as against all adverse argument.

But it may be proper here, notwithstanding what was there said of *Trustees of Schools* v. *Schroll, supra,* to notice, if but briefly, some features of that case.

In holding that the Trustees of Schools could, under

the evidence, sustain ejectment, the court, by Mr. Justice SHOPE, declared:

> "Some part of the premises described in the declaration must form the bed of that part of Meredosia Lake within section 16;"

but he said further:

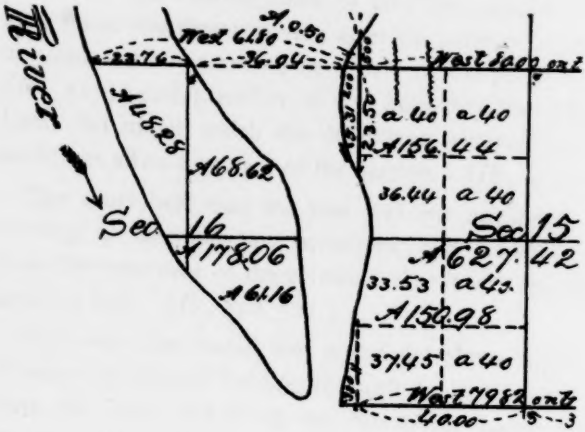
> "What part is lake bed and what shore, we cannot determine from this record." (120 Ill., 523.)

However, it was distinctly held that title to the whole of section 16, whether shore or lake bed, passed to the state under the Enabling Act, after the passage of which act said section ceased to be a part of the public lands (*Ib.*, 517); and therefore it was held that the Swamp Land Act under which the defendants claimed in part could not affect any part of the section. (*Ib.*, 517.)

The court held that the lake was not navigable, according to common law principles, and substantially, from the statement of the evidence, that it was not navigable in fact. (*Ib.*, 520, 521.)

The court also found that it did not appear that the Trustees of Schools, holding through the grant from the state the lands bordering on Meredosia Lake, made grants, to the extent they were made, of lots as being bounded by the lake. The court concluded that the defense based on the rights as riparian owners on streams to take *ad filum aquae* could not be invoked, and had no application to the case. (*Ib.*, 523.) Nor did it appear that the lots claimed by the defendants were by the plat which governed the sales by the Trustees of Schools bounded on Meredosia Lake. There was really no occasion for the court to consider whether there was any difference in the law between a stream and a lake in the matter of boundaries of land bounded thereby.

MAP No. 10.


River
West 6.80
23.76
26.94
West 80.00 ch.
A 0.50
A 48.28
A 68.62
Sec 16
A 178.06
A 61.16
a 40
a 40
A 156.44
36.44
a 40
Sec 15
A 627.42
33.53
a 40
A 150.98
37.45
a 40
West 79.82 ch.
40.00
S 3

No effort was made in the case to find what was the common law, nor was the *Beckman-Kreamer* case alluded to, nor was the cause for the New England decisions, nor for the decisions in tide water cases, recognized.

(Map No. 10 herein shows the original government survey of that part of the lake lying in sections 15 and 16.)

In observing map No. 10, we may suppose the lake to have been meandered in the public survey. This would be inferred from the fractional tracts or areas platted. Therefore, it would be pertinent to inquire what ownership applied to the different parts of the lake. Supposing that all of section 16 passed to the State of Illinois under the Enabling Act, as was held in *Trustees of Schools* v. *Schroll, supra,* did the part of section 15, which was within the lines of the lake as meandered, pass also to the state, but without any grant from the United States, and from the mere fact that the surveyor meandered the lake in a body?

According to the view or theory suggested by Mr. Justice Phillips, in the present case, the part of the lake north of section 16, and also the part in section 15 might be treated as public, or held in common for the people of the state, because the lake was meandered, while another part, namely, all lying in section 16, would be a private water, passing to the state by the Enabling Act, and subject to sale by the Trustees of Schools. Thus anomalous is the theory.

If, however, the question, how a grant of land on a lake should be construed had been a vital one in the Schroll case, or a necessary question, it would have been

expected that a collation of authorities on the subject would not have been on one side only, but, contrariwise, would have included such as followed the common law. That the court did not consider cases of the latter character seems evident from the fact that no such cases were cited.

Ordinarily, if a case is important, and presents a single question distinctly, that question will be investigated with some thoroughness; but the facts did not in the Schroll case require consideration of what was the common law as to the proprietorship of the bed of the non-navigable lake, further than to find, as the court did find, that the same passed to the State of Illinois in the given instance, under the Enabling Act.

Besides the opinion in the case, that a grant of land "bounded along and upon a natural lake or pond" would extend only "to the water's edge" (120 Ill., 519), was but argumentative. It was incidentally expressed in answer to an argument that the water to be considered was a stream adjacent to the land conveyed, while the court concluded it was a lake, though the court said it did not find (*Ib.*, 523) "that the grants, to the extent that they were made, were bounded on the lake."

The opinion was therefore not only incidental to the argument of counsel, but it was an *obiter dictum*. Hence, according to the principles laid down in *Carroll* v. *The Lessee of Carroll*, 16 How., 275 (an ejectment suit), it was not authoritative here, upon the question which was directly presented in *Hardin* v. *Jordan, supra,* and *Mitchell* v. *Smale, supra.*

The cases cited by Mr. Justice Shope to show that a different rule applies when land is conveyed as bounded

along and upon a natural lake or pond, from that which applies when the land conveyed is upon streams or bodies of water other than lakes or ponds, do not maintain the position that there is such difference, according to the common law principles.

It would not be specially profitable, perhaps, to review *in extenso* the authorities which were noted (120 Ill.) by Mr. Justice Shope in suggesting such supposed difference.

His references to Angell on Watercourses, and to a note in 3rd Kent's Com., show that in answering positions taken by the counsel of the defendants in the case, he looked to cases or references which followed the colonial ordinances of Massachusetts of 1641 and 1647. by which great ponds were withdrawn from sale and reserved for the use of the public at large, and not to cases presenting the common law principle.

The case of *Warren* v. *Chambers*, 25 Ark., 120, one of the authorities cited, recognized the right of a person buying from the United States lands situated on a lake to hold, as a part of the tract patented to him, a strip of land lying between his original upland and a meandered lake, which strip had become dry by the recession of water. While the land which had become unsubmerged was treated as an addition by dereliction, or as an alluvial formation, there was no intimation that the state acquired title to the lake bed by reason of the lake having been meandered. The court protected the patentee's title to such land.

Speaking generally, the authorities cited by Mr. Justice Shope were based on colonial ordinances, namely, on legislative enactments by a colony as to its own posses-

sions, and proceeded upon views other than common law principles as to non-navigable water.

For example, Mr. Angell, in §42 of his work on *Watercourses,* speaking of the law of boundaries in respect to lakes, cited two New Hampshire cases, a case decided by the Supreme Court of Maine, and a case decided in Vermont; and also cited *Canal Commissioners* v. *People,* 5 Wend., 423, a case involving a question whether there was private ownership of a part of the Mohawk River. From the last named case he quoted a *dictum* from Chancellor Walworth, a minority judge in the case, a *dictum* which did not apply to the facts in the case.

As to the cases so cited from Maine, New Hampshire and Vermont, it is to be remarked that this court observed in *Hardin* v. *Jordan, supra,* that the colonial ordinance of Massachusetts adopted in 1641 and amended in 1647, prohibited the towns from granting away great ponds, and

> "seemed to have been the foundation of a local common law in Massachusetts (including Maine) which led to a course of decisions with regard to the title of lakes and ponds at variance with the general common law, and which have been followed in New Hampshire and some other states."

Maine, as far as the Kennebec River, was, as is understood, annexed to Massachusetts in 1652, and in 1712 it lost its separate history in that of Massachusetts. It might therefore appropriately follow the Massachusetts ordinance.

New Hampshire was several times connected with Massachusetts up to 1679, when it became a royal province; but it renewed its connection with Massachusetts

in 1689. It was for a short time attached to New York. In 1741 it became a separate province.

Vermont was first settled about 1724 by emigrants from Massachusetts, or perhaps at Ft. Dummer by English settlers from Connecticut, under grants from New Hampshire.

Connecticut was embraced under the Charter of Massachusetts, and continued under the same jurisdiction until 1662, when a separate charter was granted.

The whole territory of Maine was subject to the colonial ordinance of 1641.

Parker v. *Cutler Mill Dam*, 20 Me., 353, 357.

At the time of the enactment of the colonial ordinances of 1641 and 1647, some great ponds and the title to some navigable bodies of water had passed into private ownership under special grants. These were not regulated. Rights under such grants were not impaired nor invaded by the ordinances, the object of which was to devote to public use the great ponds, so far as they had not been previously appropriated, or so far as they were lying in common, as appears from *Inhabitants of West Roxbury* v. *Stoddard*, 7 Allen, 158, 165. The ordinances were especially a limitation upon the "discretion of the magistrates." (*Ib.*, 166.)

When title rested in a colony, or in a state after independence, it was competent for the colony, or the state, to legislate in a manner to affect its own holdings or possessions. Each state might make grants to suit itself, reserving to itself, or for the use of the public, bodies of water, or limiting its grants as it might choose; and to a considerable extent the early cases in New England,

and some cases in New York, concerning the law of boundaries of lands granted as lying on bodies of water, depended on the terms of the grant, or had a special or local application. The interest which the grantor had in such a body of water was an element for consideration; and want of title in the grantor to the soil under such water, or in like manner a reservation by the colony or primary owner, as by the ordinances mentioned, was a material consideration.

Such cases are not to be treated as cases construing grants made by the United States.

In a large measure the grants in New England were subject to final determination by the local courts; and none of them perhaps became subject to review by this court. It was not, in such cases, as if a claim could have been made under the constitution or laws of the United States.

In *Shiveley* v. *Bowlby*, 152 U. S., 1, Mr. Justice Gray reviewed with much thoroughness the influence of the Massachusetts ordinance in that colony and in kindred communities. The learned justice traced the legislation and the judicial decisions in many states in regard to navigable waters. The case was one for the quieting of title to lands below high-water mark in the City of Astoria, Oregon, in a tidal water, a part of the Columbia River.

The court held that:

> "The title and the control of lands under tide waters are vested in the sovereign for the benefit of the whole people, and that upon the acquisition of the territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the

same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory." (*Ib.*, 57.)

While it was held that

"the title and rights of riparian or littoral proprietors in the soil below high-water mark (in such tide waters) * * * are governed by the laws of the several states, subject to the rights granted to the United States by the constitution" (*Ib.*, 58);

such has not been held to be the law as to non-navigable inland waters which were a part of the public domain.

After stating the common law as to tidal or public waters (*Ib.*, 10-14), the opinion gave a summary of the laws and course of decisions of the original states concerning such waters; and it was remarked:

"That each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public."

It was properly added:

"Great caution, therefore, is necessary in applying precedents in one state to cases arising in another."

Such words of caution should not have been without effect in the present case.

It was properly said by McKinstry, Justice, in *Lux* v. *Haggin*, *supra* (S. C., 10 Pac. Rep., 751):

"Neither the state legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United

> States, nor to detract from the estates in such lands granted under the laws of the United States." (10 Pac. Rep., 745.)

In the opinion in *Trustees of Schools* v. *Schroll, supra,* Mr. Justice Shope cited, as indicating the law of boundaries of land on a lake, *State of Indiana* v. *Milk,* 11 Biss., 197, 11 Fed. Rep., 389. In that case Judge Gresham passed upon a demurrer to a special answer. As favoring the proposition that when land was conveyed bounded along or upon a natural lake or pond, the grant extends only to the water's edge, his Honor cited cases from New York, Maine, New Hampshire, Vermont Massachusetts and Wisconsin, and also, in the same connection, he cited the case of *Seaman* v. *Smith, supra,* an Illinois case, which Illinois case discussed the question how a private grant of land bordering on Lake Michigan should be construed as to the extent of the boundaries of the same with reference to that great body of water. But it is to be remarked that the cases cited by his Honor, Judge Gresham, were not common law cases concerning non-navigable bodies of water, and further that the reason assigned by him for limiting a grantee to low-water mark because of a supposed difficulty of division, when recognizing extension into a lake of a tract bordering thereon, was expressly disapproved by this court in *Hardin* v. *Jordan, supra,* for this court remarked:

> "We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of common law."

In contrast with the decision by Judge Gresham just noted, and especially as showing the facts in the case, *State of Indiana* v. *Portsmouth Savings Bank,* 106 Ind., 435, should be examined.

It appears from the case that the grant to Dunn and Condit, which was at the foundation of the case presented before Judge Gresham, was especially considered. It was of subdivisions of land held by the state under the Swamp Land Grant, but it was held not to embrace adjoining tracts which had been within Beaver Lake. It was made by the state officials before the lake bed was in a condition to be sold. The lack of authority on the part of such officials to make a grant at the time that would include the lake bed was held to be equivalent to notice to Dunn and Condit that it was not included in the sale to them, and this was equivalent to an express reservation by the state of the whole lake bed at the time of the grant to Dunn and Condit.

That the case depended upon principles somewhat peculiar to the swamp lands held by the state appears from the opinion in the case by Mr. Justice Zoller, who declared it decided nothing in conflict with

Ross v. *Faust*, 54 Ind., 471;
Ridgway v. *Ludlow*, 58 Ind., 248;
Edwards v. *Ogle*, 76 Ind., 302;

some of which cases applied the common law principles of proprietorship over lands in non-navigable streams to non-navigable lakes, this being the established rule in Indiana.

The contrary views supposed to have been taken in Wisconsin and Iowa, in such cases as

Boorman v. *Sunnuchs*, 42 Wis., 233;
Diedrich v. *N. W. U. Ry. Co.*, 42 Wis., 248;
Mariner v. *Schulte*, 13 Wis., 775, and
Noyes v. *Collins*, 92 Ia., 566,

did not, in respect to a supposed difference of construction of grants of lands on lakes from that which applies to non-navigable streams, come from any recognition of the common law, but, on the contrary, from a disregard thereof, or the non-observance of the same.

It is true that Mr. Chief Justice RYAN, in the Diedrich case, *supra,* said (p. 264 of 42 Wis.):

> "When the riparian owner is seized of the soil under the water, his title is subject only to public use of the water, and to private rights of other riparian owners. When the water is not navigable, the public has no easement; and the riparian owner may, in general, *put his estate under the water to any proper use he may please, not infringing on the rights of other riparian owners, and not violating any public law.*"

But neither Wisconsin nor Iowa has been so fully or distinctly a common law state as Illinois has always been. Wisconsin became a part of the territory of Michigan in 1813, and subject to a Michigan statute at the time which repealed all English statutes, which Michigan statute is said to have been adopted by the organic act, and to have remained in force until 1849.

Coburn v. *Harvey,* 18 Wis., 156,
Webster v. *Morris,* 66 Wis., 366,

and especially a note on the subject at page 376 of 66 Wis.

These, with other cases, show that but a qualified recognition of the common law has been accorded in Wisconsin, depending somewhat upon variable legislation on the subject.

In Iowa "the common law has been neither repealed nor adopted" (6 Am. & Eng. Ency. of Law, p. 290 of 2nd Ed., note 3).

It has been recognized measurably by the courts as taking the place of the civil law once dominant in what is sometimes called the Louisiana purchase.

O'Farrell v. *Simplot*, 4 Iowa, 381.
Estes v. *Carter*, 10 Iowa 400.

The cases in Wisconsin cited by Mr. Justice Phillips are to a considerable extent distinguishable from the present case in that they treat of navigable waters, in respect to lands under which each state is permitted a sovereignty of domain that does not in the absence of a grant to the state apply to non-navigable waters.

Noyes v. *Collins, supra* (cited by Mr. Justice Phillips at page 487 of 161 Ill.), favors theoretically but unnecessarily the proposition that a grant of land bounded by a non-navigable lake should have a construction different from that which would be put upon it if the grant had been of land bounded by a stream of water.

The case was, however, one which pertained to swamp lands, and not applicable to patents from the United States for lands bordering on lakes belonging to the United States at the time of the sale of the bordering lands.

The plaintiff sued as the owner of a certain lot No. 6 in a subdivision by the County of Harrison, holding title through the Swamp Land Act. His claim was that the title to lot 6 should carry with it lot 7 in the same subdivision by the county.

The court argued or reasoned that the plaintiff did not get the title under the law of accretions. Also that, as the lake was meandered (under the government survey, it is supposed), the record failed to indicate that there

was any purpose to include in or by the conveyance of lot 6 any part of the lake bed. While, however, the court finally adopted a suggestion of the Supreme Court of Wisconsin in *Diedrich* v. *N. W. U. Ry. Co., supra,* that generally "the title of the riparian owner upon a natural lake or pond does not extend beyond the natural shore," there does not seem to have been any research to ascertain what was the common law on the subject.

Besides, the case, like that of *State of Indiana* v. *Portsmouth Savings Bank, supra,* was one in which the sale of a lot of swamp land bounded by another lot of swamp land could not reasonably be expected to include the latter. In the subdivision of it as land under the Swamp Land Act, what was called dry land, and which was found to have been drained or dried up, was in the mapping and subdivision of it by the county, subject from the first to be treated as land, independently of the fact that it had once been a lake.

In three recent cases in Iowa, those of

Schlosser v. *Cruickshank,*
Caldwell v. *Jackson,*
McNary v. *Same,* all in 96 Iowa, 414; 65 N. W. Rep., 344,

ejectment having been brought by patentees whose lands bordered a meandered lake, against persons claiming under a survey and sale by the government later than those on which plaintiffs depended, the Supreme Court of Iowa sustained the earlier patents, but refrained from determining who owned the land under the water of the lake, this being thought to be immaterial. Under the Iowa code and practice the plaintiffs could be allowed the full benefit of their action, giving them a remedy in full, as

against the defendants, without actually determining the question thus thought to be immaterial.

It would follow from the cases last mentioned that the Supreme Court of Iowa was not ready to decide that the state acquired any title to the lake bed, without any express grant from the United States.

Many of the cases, including such, for example, as *Lamprey* v. *State of Minnesota, supra* (18 L. R. A., 670), and *Gouverneur* v. *National Ice Co., supra* (18 L. R. A., 695), showed a more considerate and fuller research, and, as is submitted, a better method of reasoning than seems to have been adopted in any of the few cases wherein small inland non-navigable lakes have been treated as if they were navigable bodies of water, distinguishable in the matter of boundaries from the law of boundaries of tracts on streams or watercourses generally.

In the Gouverneur case, *supra*, BRADLEY, J., speaking for the court, said:

> "The views already given lead to the conclusion that the common law, relative to the construction and extent of grants of land bordering and bounded on such waters (a lake or pond) is applicable alike to conveyances bounding lands on fresh water rivers and small non-navigable lakes or ponds." (18 Law. Rep. An., 701; this after a full review of authorities on the subject.)

Observation will show that the weight of authority as to what is the common law is most decidedly with the view that was adopted by this court in Hardin v. *Jordan, supra, and Mitchell* v. *Smale, supra.*

X.

THE COURT HAD A RIGHT TO DETERMINE IN THOSE CASES WHAT WAS THE COMMON LAW DOCTRINE; AND THE DECISIONS OF THE SUPREME COURT OF ILLINOIS UP TO THAT TIME SUSTAINED, OR WHEN PROPERLY LIMITED TO THE QUESTION ACTUALLY OR NECESSARILY DECIDED, DID NOT CONTRAVENE, THE SUGGESTION THAT SUCH WAS THE COMMON LAW.

Even in the case of *Trustees of Schools* v. *Schroll, supra,* it was not claimed that under the common law a conveyance of land bounded by a lake that was non-navigable should have a different effect or operation from that which it would have, in respect to the matter of meander, if it had been a conveyance of land bounded by a river, that is to say, no inquiry as to what was the common law arose. There was not, to be sure, any necessity in that case for asserting a difference; but in so far as an intimation of such difference was made, it is clear that it came from answering a position of counsel that was not found to harmonize with the proofs, but was found by the court to be theoretical. The theoretical view was answered by reference to authorities or cases pertinent to other jurisdictions, and not, when properly considered, indicative of the common law.

As this court held in *Carroll* v. *Carroll,* 16 How., 275, 287, per CURTIS, J.:

> "Any opinion given here or elsewhere cannot be relied on as a binding authority unless the case called for its expression."

As was held in *Pass* v. *McRea*, 36 Miss., 148:

"Adjudications are to be considered only in connection with, and as explained by and limited to the state of circumstances appearing in the record, that is, the essential circumstances constituting the case, or that portion of the case on which a decision rests."

Thus, when the defendants in *Trustees of Schools* v. *Schroll, supra,* did not show a conveyance of land bounded by a lake, the question, what would have been the effect if the defendants had so shown, was not actually involved; and an expression on such a point was but a *dictum*, a matter of unnecessary argument. Nor is it as if authorities *pro* and *con* had been examined, and the decision had been based upon such examination. Evidently, the authorities examined were not those which applied to common law doctrine.

XI.

THIS COURT IS NOT REQUIRED IN PASSING UPON THE EFFECT OF A PATENT FOR PUBLIC LANDS TO SURRENDER ITS OWN JUDGMENT AS TO WHAT IS THE COMMON LAW.

It was within the province of this court to determine in *Hardin* v. *Jordan, supra,* and in *Mitchell* v. *Smale, supra,* what was the common law as to boundaries under a patent from the United States for land on a non-navigable body of water which had been a part of the public domain, subject to such sale under the Public Land Laws.

This was a matter which did not depend upon state statute or local state law.

The court could have declared, as was done by Mr. Justice MILLER, in *Yates* v. *Milwaukee*, 77 U. S. (10 Wall.), 497 (19 Law. Ed., 987):

> "The law which governs the case is the common law, on which this court has never acknowledged a right of the state courts to control our decisions except, perhaps, in a class of cases where state courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the state."

When this court considered the question what was the common law in the case and decided what construction should be put upon the patent in view of the fact, among other incidents, that the lake was meandered while it was a part of the public domain, it was not for the Supreme Court of the state to overrule that construction, nor was it competent for the state court to make a binding construction, limiting the rights of the patentee as to boundaries on a non-navigable lake, independently of this court. The Supreme Court of the state in this case chose to hold that the *Trustees of Schools* v. *Schroll, supra,* should be taken to be the law of the case, contrary to the view which this court had taken in respect to the same matter. But when this court found what was the common law, it but followed the lead of the Supreme Court of the state, so far as any statement of the common law, ostensibly as such, had seemingly been made by that court; and now it is not necessary for this court to recede from its decision.

Again, if it could be argued that in deciding *Hardin* v. *Jordan, supra,* and *Mitchell* v. *Smale, supra,* this court first, or in advance of a consistent or settled course of decision by the state court, decided a question arising under the common law pertaining to boundaries under a

government grant, this court should not feel bound to surrender its convictions on the subject on account of a contrary subsequent decision of the state court. For, as was remarked by Mr. Justice GRIER, speaking for the court, in *Pease* v. *Peck*, 59 U. S., 595 (15 Law. Ed., 520):

> "When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions." * * *

To a like effect is *Town of Roberts* v. *Bolles*, 101 U. S., 119 (25 Law. Ed., 884), in which case Mr. Justice Harlan delivered the opinion of the court.

In *Nelson* v. *City of Madison*, 3 Biss., 244, Hopkins, Judge, treating of a case of supposed dedication by prescription, and considering that the case presented a common law question, held that he was to be governed thereon by the decisions of this court, and not by a prior decision of the Supreme Court of Wisconsin.

In *Morgan* v. *Curtenius*, 20 How., 1 (15 Law. Ed., 823), this court found that a deed for land had by the judgment of the Circuit Court for the District of Illinois in an ejectment suit been construed according to a decision of the Supreme Court of the state, but that a later decision by that court construed it differently; and this court declined to follow such later ruling of the state court.

The question, how a grant of land bounded by a non-navigable water was to be construed, especially in the case of a grant by the United States, not having been necessary to be decided in *Trustees of Schools* v. *Schroll*, *supra*, the opinion given on that subject in that case was not authoritative here.

Gibson v. *Lyon*, 115 U. S., 439 (29 Law. Ed., 440).

Under the case just cited it would not have been conclusive here, even if it had been on a question arising upon the record in this court. It being the first case of its kind, it would not be construed as making a rule of property. It was certainly in conflict with prior decisions as to the object of a meander, and therefore it was not necessary to follow it.

Gelpcke v. *Dubuque,* 1 Wall., 175 (17 Law. Ed., 520).

Upon the question as to the common law, this court was not required to rest its judgment on the intimation given by the Supreme Court of the state in *Trustees of Schools* v. *Schroll, supra* (not, however, given as a view of the common law). But this court could, as was held in *Carroll* v. *Carroll, Lessee, supra,* decide the matter independently of the anomalous ruling of the state court.

XII.

WE HAVE HERE A QUESTION OF GENERAL LAW, SO MUCH SO THAT EVEN IF A STATE COURT HAD BY REPEATED DECISIONS LIMITED THE EFFECT OF A GOVERNMENT GRANT, THE RULE OF PROPERTY RIGHTS COULD NOT BE INVOKED, BECAUSE IT IS NOT THE PROVINCE OF A STATE COURT TO TAKE AWAY FROM A GRANTEE OF THE UNITED STATES THAT WHICH PASSED BY THE GRANT, AND CLAIM IT FOR THE STATE, THAT IS TO SAY, THE STATE COURT IS NOT THE ULTIMATE ARBITER.

When a state court holds that a state has title to the bed of a non-navigable lake, the conclusion is subject to review here in such a case as is here presented.

Supposing it to be a common law question, how a patent for land, according to the plat of a government survey, should be construed, this court need not follow a state court when that court has changed its former ruling, nor when there is inconsistency of ruling. Nor is this court called upon to retrace its rulings as to this property and put a new and enlarged construction upon the matter of meander. For the meander was an act of a ministerial officer connected with the survey of the public lands. The effect of such act was subject to be determined by this court, which could also rightfully determine whether the surveyor's act limited the rights of a patentee.

The decisions in Illinois as to the object or effect of the meander of a body of water in the public surveys had been too numerous, before *Hardin* v. *Jordan, supra,* was decided, to doubt their purpose. They had been uniform. Hence a later decision by the state court should not be allowed to prevail. Nor should it require from this court the recalling of the decision or judgment in *Hardin* v. *Jordan, supra,* as to the property therein involved, now coming under consideration again almost as if that case and *Mitchell* v. *Smale, supra,* presented by Mr. Shedd, defendant in error herein, were again brought here for reconsideration.

While, as above suggested, each state may be allowed to determine as to navigable rivers therein, whether it will relinquish the beds thereof to private ownership, subject to the rights of navigation and the general public easement, such rivers being in some of the states public highways by Act of Congress, (Rev. Statutes, U. S., §§ 2476, 5251); yet Congress carefully marked a distinction between navigable rivers and those which are not

navigable. The latter section placed navigable rivers and waters in the former territories of Orleans and Louisiana in the same class.

Supremacy has never, however, been yielded to the state courts to determine that a state has the proprietary interest in non-navigable waters once a part of the government domain. Nor has it been left to a state to determine ultimately the effect of patents from the United States for public lands.

The state can only claim title to non-navigable bodies of water, or the submerged land therein, by express grant. It can neither claim them for itself in the absence of such grant, nor can it take from them the element of private ownership following from the law applicable thereto.

The Supreme Court of the state could not, as appears from the opinion of Mr. Justice Phillips, find title in the state, since the adjudication of the Land Office denying the claim made by the state remained binding, unless upon a direct proceeding by the state to set it aside. Nor could the court find title in the state upon a ground or principle not stated or presented when the state made claim in the Land Office. The adjudication in the Land Office, like any other adjudication, was conclusive as to any matter that might have been presented. It thoroughly denied any right on the part of the State of Illinois. It did affirm title in the United States. In this respect the adjudication left but three parties in interest, namely, the United States, the patentees under the survey of 1834-5 and the claimants under the survey of 1874. The state was eliminated as a party. The County of Cook was also eliminated as a party, as was also the Illinois Central Railroad Company.

As was remarked by Mr. Justice Field, in the opinion of the court in *Packer* v. *Bird, supra,* the term "navigable" in its application to waters in the United States has been enlarged beyond the common law distinction. But how enlarged? It has been applied to the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide.

It is a general rule that the title to the soil under navigable waters within the territorial limits of a state is *prima facie* in the state, and that the title to the soil under innavigable waters is *prima facie* in the riparian owners.

(18 Am. & Eng. Ency. of Law, 2nd Ed., p. 130.)

But this court has not left it to the states to determine that non-navigable waters shall, in the construction of patents for lands platted and sold by the government, be classed with those which are navigable in law or in fact. Nor does it properly lie with a state to determine the ownership of the soil in non-navigable waters, and treat such waters as being granted to the state because of the act of a deputy surveyor in running a meander line, or because of any mistake of a public officer in designating as navigable a body of water that is not so in point of fact.

XIII.

THAT THE LAKE REMAINED A PART OF THE PUBLIC DOMAIN AFTER THE MEANDER THEREOF IN 1834-5 CANNOT BE DOUBTED.

A test in this respect might appear in different forms. Take, for example, a case in which a meandered lake, not at first sectionized or subdivided, has in time been so

sectionized and subdivided. Instances of this sort have not been uncommon. Of course, as the object of meandering has generally been understood, that might be done while the bordering lands platted and held for sale by the government remained unsold. In such cases the government might have sold the lands within the former lake bed separately from the lands adjoining the lake as formerly meandered, or might have sold any part of the lands sectionized, whether in the lake or not.

Hodges v. *Williams,* 95 N. C., 331, was a case in which the state had sectionized and sold certain lake bed lands first, and before selling the lands bordering on the lake. Having ceased to be proprietor of the lake, it was held that the state could not grant to a subsequent patentee of the lands which approached the lake an interest in the lands (lake) previously sold. That was a case in which the grant by the state would be presumed to be of land alone, without water being named or referred to through the plat as a boundary.

Examples or tests could be found under the Swamp Land Grant. The states took lake beds, that is to say, they took under those grants the lands within meander lines in meandered lakes, by virtue of the Swamp Land Act. This was so in *Bristol* v. *County of Carroll, supra.*

So in *Kean* v. *Roby,* 145 Ind., 221. The State of Indiana took under the Swamp Land Act the part of Wolf Lake (the lake here in question), which was involved in the case. That part, as well as the part in Illinois, had been meandered, and it became private property by grant from the state, as appears from the report; but it first became the property of the state, not in its sovereign capacity, but under the Swamp Land Act. The part

of the lake so involved was a large part of the Indiana portion of the lake. In that portion of the lake (see plat in the report) was the arm called Wolf River, reaching out almost to Lake Michigan, which arm, according to the evidence in this case, was used at times in opening the bar at Lake Michigan to reduce the water in Wolf Lake.

The record in *Kean* v. *Roby, supra,* was brought to this court for review, but the case was dismissed under the tenth rule. (178 U. S., 615.)

Kean v. *Calumet Canal and Improvement Co.,* No. 47 at the present term, relates also to a part of Wolf Lake.

The whole Indiana portion of Wolf Lake became and is private property through the Swamp Land Grant.

Why, when a grantee holding indirectly from the United States under the Swamp Land Act is allowed to hold the submerged portions of Wolf Lake in Indiana, as private property, should grantees from the United States having the patent title to the lands in Illinois bordering upon shallower parts of the lake be denied like rights? Is there a just reason for making this difference? Is it proper to deny the Illinois owner the usual common law rights?

Under the usual construction of the patents in such cases, the United States being the proprietor making the grants, and not reserving any part of the lake in granting the bordering lands, the lake represented in the plat would, as an entirety, be a boundary and the interest of the United States in the lake bed would, in due proportions, pass to the patentees of such bordering lands.

Undoubtedly the lake bed land involved in *State of Indiana* v. *Portsmouth Savings Bank, supra,* stood in the category of being a part of a meandered lake when the Swamp Land Act took effect.

In the opinion in this case by Mr. Justice PHILLIPS (p. 490 of 161 Ill.), it is said:

> "Prior to 1850 there were many lakes similar to those in this record referred to in many of the states, which induced the passage of the Swamp Land Act, with the amendments."

The policy of the state then was, and continued to be, to drain the marshes and the shallow lakes, and bring the soil under cultivation.

It is believed that the state did not in any instance claim any such lake because of the same having been meandered. The evidence in this record, contained in a decision by the Commissioner of the General Land Office (Record, 91), shows that the state claimed title to the lake bed lands as surveyed in 1874, and through the state the County of Cook claimed under the Swamp Land Grant, but neither asserted that the meander was equivalent to a grant by the United States, or amounted to a concession by the United States.

The claim made by the state was not one of ownership as an attribute of sovereignty, but it was one of direct grant by the Swamp Land Act; and this claim in its own terms recognized that there had been proprietorship in the United States, subject to be transferred only by direct grant.

Again, lakes were not meandered because of any special rule, or under any statutory direction. The meander was never for the purpose of signifying that any special interest was thereby given to the state, nor was it ever intended by such meander to diminish in any way the rights of the United States.

XIV.

HOW ARE THE LAKES OR PONDS, THE BED UNDER WHICH IS HELD BY PRIVATE PROPRIETORSHIP, TO BE APPORTIONED AMONG THE SEVERAL PROPRIETORS WHOSE UPLAND ORIGINALLY BORDERED ON THE SAME?

A suggestion by way of argument *ab inconvenienti*, in reference to going to the center, was advanced by Judge Gresham in *State of Indiana* v. *Milk*, *supra*. Such suggestion, though opposed to what has been settled as the law in Indiana, as well as in nearly all of the states in which the subject has been considered, doubtless had persuasive influence upon the opinion of the court by Mr. Justice Shope in *Trustees of Schools* v. *Schroll*, *supra*, and again, and perhaps even more forcibly, upon the opinion of the court by Mr. Justice Phillips in the present case.

But this court said, in *Hardin* v. *Jordan*, *supra*:

> "We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of the common law."

Special consideration of what has actually been done under the common law rules can hardly be said to have been given by those of the learned judges who had the *Milk* and *Schroll* cases before them; for neither as to the general law on the subject, nor as to the actual methods of apportionment or division do the common law cases seem to have been brought to the notice of the judges, though it is possible that it was assumed in any remarks at the bar that the matter would be understood without producing authorities.

Upon examination of the subject, it will be found that there is not so much difficulty in making a division or apportionment as occurs in the case of incurved shores of large rivers, or in the division of flats on coves and bays, or on the seashore and the borders of the Great Lakes; nor anything like the inconvenience that happens when a close watch must be kept to see whether there is a small accretion, and to what tract it first connects itself.

In the opinion by Mr. Justice Phillips (Record, 466) it seems to have been supposed that there would be impossibility of establishing a reasonable rule for apportioning lake beds "in the absence of legislation determining" how it should be done. Why should there be legislation by the state?

The suggestion in *Hardin* v. *Jordan, supra,* that "just and equitable rules have been adopted for settling the mutual rights of parties in such cases," seems to have been overlooked, as was, also, the suggestion that

> "the supposed difficulty or inconvenience in applying the law * * * is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bottoms or flats lying in front of their riparian lands."

Could it have been supposed in the opinion by Mr. Justice Phillips that the General Assembly of the State of Illinois could determine by itself a policy for the general government, determinative of or controlling the rights of purchasers of public lands bordering on the non-navigable lakes and waters? Nothing in the policy of Illinois could control in respect to such rights. The state did not stand in its relations toward non-navigable bodies

of water as did the grantees of the crown in the New England colonies prior to the adoption of the colonial ordinances, or while the great ponds had but few of them been alienated; and this fact seems not to have been appreciated in the opinion of the Supreme Court of the state on this subject.

In another part of the opinion (Record, 474), it was remarked by Mr. Justice Phillips that there would, if the views of this court were sanctioned, be "the injustice of holding that the purchaser of a small rim of the lake, consisting of a few acres, would at once become the owner of thousands of acres of a non-navigable lake;" and this idea, it was supposed, had "caused many courts to hold the riparian proprietor takes only to the water's edge."

But if such inequality were possible, yet it was not and is not more likely in following the common law rules than in giving accretions finally, though with much less certainty of fairness in the case of lakes, nor could such supposed inequality as a difference between lakes and rivers be exemplified by reference to the present case.

There is not in this regard a disproportion or inequality in the case of lakes as compared with rivers. For example, in *Houck* v. *Yates, supra,* the title of what had become an island of 600 acres was in effect adjudicated as belonging to the patentee of two fractions on the shore having less shore frontage than the tracts of plaintiff in error Hardin in this case, and besides the island, other land, both unsubmerged and submerged, was found to belong to the fractions patented, although those fractions were probably in themselves larger in area of

original upland than would have appeared from the plat of the government survey. In that case the government could have had the island surveyed as its own in the first instance, if it had formed before sale of the land on the river border, just as in this case it might have sectionized the whole or any part of the lake if it had chosen so to do in preparing for sales to settlers or other purchasers. But it did not choose to adopt a policy so parsimonious and so unlikely to promote settlement and the reclamation of swamps.

In *Fuller* v. *Dauphin, supra,* the land involved in the action was an island for which the plaintiff claimed title under the Swamp Land Act. The defendant showed government title to the land bordering on the water in front of the island, and his title to the island was held to be good, although he did not pay for the island as an area of land; the court adhering to its previous decisions that a meander line is not a boundary line.

It is to be noted here that in the opinion by Mr. Justice Phillips he favored the same construction in the case of lakes of any size, irrespective of the fact of their being non-navigable, so holding under *Trustees of Schools* v. *Schroll, supra.* (Record, 474, 480-1.) He announced with definiteness that the suggestion of that case was to be applied to lakes meandered, "regardless of the question whether or not they were navigable."

The injustice of depriving the patentee of small tracts upon non-navigable lakes of the incident of ownership of a separate portion of the submerged land under the water (such lakes being often liable to evaporate or vanish, sometimes in a short period), would be as great in cases of such small lakes as it would be to withhold

from the shore proprietor under patent from United States of lands bordering upon small non-navigable streams a proprietary interest in the bed.

In *Clute* v. *Fisher*, 65 Mich., 48, followed substantially by *Stoner* v. *Rice*, 121 Ind., 51 (6 L. R. A., 387), it was held that the owner of a fractional subdivision of land, made so by an inland lake, owns the soil under the water of said lake which would be included within a regular congressional subdivision if its lines were fully extended. It was, however, stated at the close of the opinion in that case,

> "in case of a body of water so large that the lines of the sections, or subdivisions of sections, held by the proprietors of the lands adjoining or surrounding said lake, if extended, do not embrace the whole of said lake, then the rule of riparian ownership may be extended to the center line of said lake, in accordance with the rule laid down by Justice Campbell, in *Lincoln* v. *Davis*, 53 Mich., 390."

The Clute-Fisher case was decided in 1887; and in its suggestion of being guided by congressional subdivisions in apportioning a lake bed, it followed what was supposed to be a rule conforming to *Brown's Lessee* v. *Clements*, 3 How., 665. The last named case was, however, disapproved of and overruled in *Gazzam* v. *Lessee of Phillips*, 20 How., 372; that case holding that the Act of Congress gave larger discretion to the Surveyor General as to regulating the size of subdivisions of public lands than was supposed in *Brown* v. *Clements*, *supra*. The subject again came up before the Supreme Court of Michigan in *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.*, 102 Mich., 227; S. C., 25 L. R. A., 815; and the matter having been carefully reviewed, it was found that *Clute* v. *Fisher* needed correction in so far as it suggested adherence to a rule erro-

neously supposed to have been laid down in *Brown's Lessee* v. *Clements, supra.*

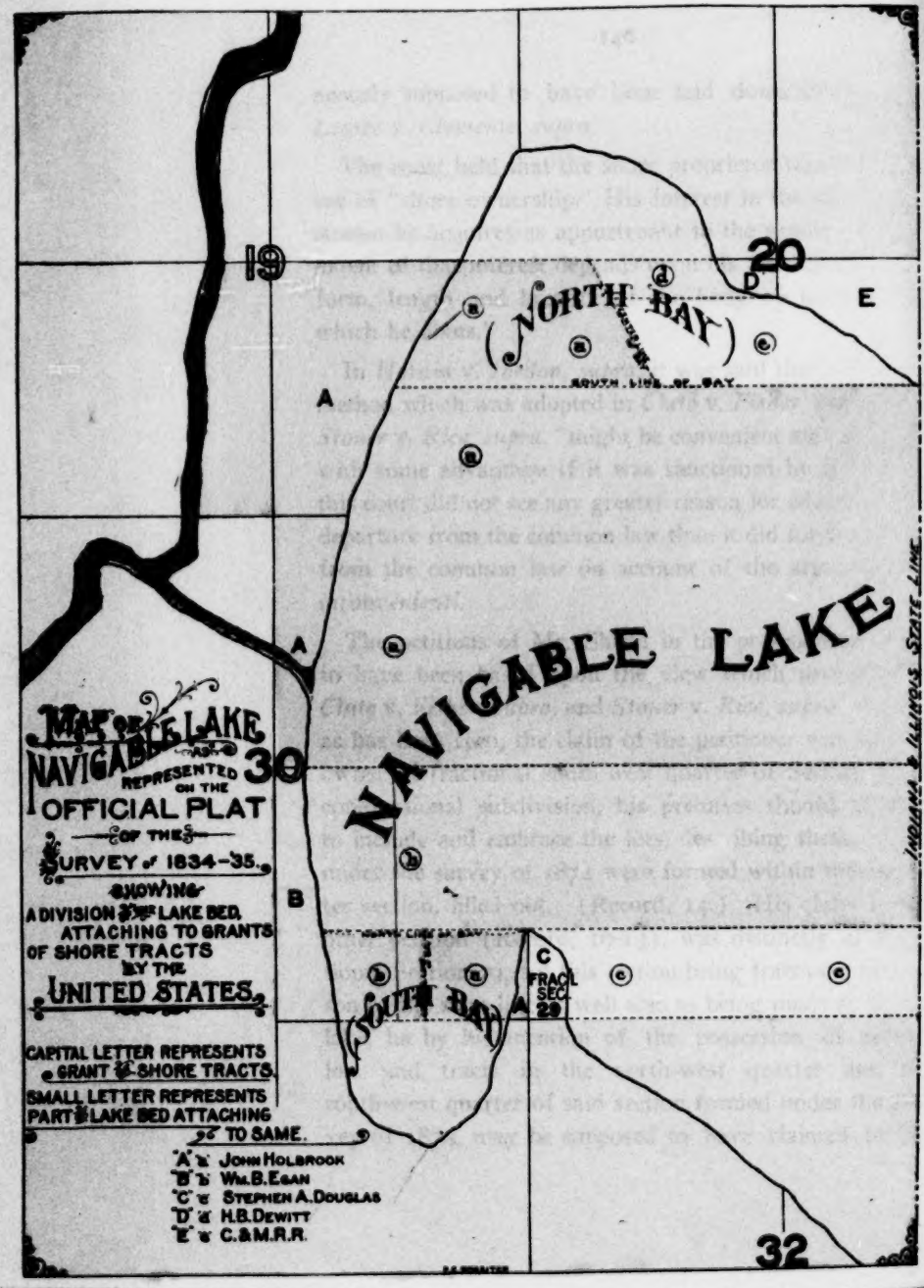
The court held that the shore proprietor takes by virtue of "shore ownership. His interest in the bed of the stream he acquires as appurtenant to the grant; and the extent of that interest depends upon his frontage and the form, length and breadth of the body of water upon which he abuts."

In *Hardin* v. *Jordan, supra,* it was said that while the method which was adopted in *Clute* v. *Fisher, supra,* and *Stoner* v. *Rice, supra,* "might be convenient and attended with some advantage if it was sanctioned by the law;" this court did not see any greater reason for adopting this departure from the common law than it did for departing from the common law on account of the argument *ab inconvenienti.*

The petitions of Mr. Shedd in the present case seem to have been based upon the view which prevailed in *Clute* v. *Fisher, supra,* and *Stoner* v. *Rice, supra.* Hence, as has been seen, the claim of the petitioner was that as owner of fractional south-west quarter of Section 20, a congressional subdivision, his premises should be held to include and embrace the lots, describing them, which under the survey of 1874 were formed within that quarter section, filled out. (Record, 14.) His claim in his other petition (Record, 10-13), was distinctly of Fractional Section 29, but this section being fractional by reason of the state line as well also as being made so by the lake, he by his mention of the possession of certain lots and tracts in the north-west quarter and the south-west quarter of said section formed under the survey of 1874, may be supposed to have claimed by in-

NAVIGABLE LAKE

MAP No. 16.


19
20
30
32
A
B
C
D
E
NORTH BAY
SOUTH BAY
NAVIGABLE LAKE
INDIANA & ILLINOIS STATE LINE
FRACL SEC. 29
MAP OF NAVIGABLE LAKE AS REPRESENTED ON THE OFFICIAL PLAT OF THE SURVEY of 1834-35. SHOWING A DIVISION OF LAKE BED, ATTACHING TO GRANTS OF SHORE TRACTS BY THE UNITED STATES.
CAPITAL LETTER REPRESENTS GRANT OF SHORE TRACTS.
SMALL LETTER REPRESENTS PART OF LAKE BED ATTACHING TO SAME.
'A' is JOHN HOLBROOK
'B' is WM. B. EGAN
'C' is STEPHEN A. DOUGLAS
'D' is H.B. DEWITT
'E' is C. & M. R.R.

ference those lots and tracts, and therefore to have proceeded upon the theory that whatever there was under both surveys in Fractional Section 29 was comprehended in the patent to Stephen A. Douglas, or a part of the tract described in that patent.

The decree which is to be reviewed herein awarded to defendant in error Shedd some land not embraced in his petitions.

The question above proposed was answered in *Hardin* v. *Jordan, supra.* The court there said:

> "Just and equitable rules have been adopted for settling the mutual rights of parties in such cases," namely, "in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bottoms or flats lying in front of their riparian lands."

The court, in conclusion, said:

> "that the court below ought to have given judgment to the center of Wolf Lake, instead of to low water mark in front of the south-east fractional quarter of Section 19, and in front of the north-east fractional quarter of Section 30, and to the middle of the bay or projection of said lake in front of the east part of the south-east fractional quarter of said Section 30."

The Circuit Court, in pursuance of the mandate from this court, rendered a final judgment December 10, 1896, in favor of plaintiff in error Gertrude H. Hardin, in the ejectment suit which had been reviewed in this court, the terms of which judgment will be seen at pages 433-4 of the record in this case.

Map No. 16 herein, following the government plat, shows, by way of illustration, a subdivision or apportionment between the different owners. The portions in pink represent the parts for which said judgment was

rendered. The map may be used for further illustration. The portions in green, lettered (c) and (d), are parts which would go to Mr. Shedd under the principles of the decision in *Hardin* v. *Jordan;* such portions being attached to the fraction in Section 20 lettered (D), and the part in Fractional Section 29 lettered (C), respectively. The part in buff lettered (e) would be attached to the part in the same color lettered (E); and the parts in light purple lettered (b) (b) would be attached to the part in the same color west of the meander, lettered (B).

In this method of division the northern part of the lake, down to the line marked "South line of Bay," is treated as a bay and marked "North Bay." The east line of Mr. Shedd's fraction known as the south-west fractional quarter of Fractional Section 20 (Record, 58), is given the length shown in the testimony of Mr. Rossiter as to distance to lake when at 2.5 above *datum* (Record, p. 312); that divisional line (the north and south center line of Section 20) not having been run by the surveyor, he not having been expected to run lines into the interior of the section. The next fraction east, marked (E), being the south-east fractional quarter of Section 20, is given as to its east line the length stated on the government plat, being 22.69 chains, and from the south termination of that line, the line marked "south line of bay" is extended westward to the meander line.

The division line marked "center line of bay" is at a point midway between the fractions in Section 20 and the northern part of the south-east fractional quarter of Section 19.

The line marked "center line of bay" in what is shown as "South Bay" is midway between the east fraction of

the south-east fractional quarter of Section 30 and the west fraction (west of the lake), of the south-east fractional quarter of Section 30.

In respect to that part of the bed of the lake and bay attaching to the west fraction (west of lake) of the south-east fractional quarter of Section 30, shown on the map in light purple color, the record shows a conveyance by the former owners to Gertrude H. Hardin, plaintiff in error, of all that part of the same lying east of a north and south center line of the south-east quarter of the section when made full or squared out.

The part marked in light purple would in a decree herein on these principles be divided somewhat differently from the representation of this map—that is to say, differently in view of the conveyance to Mrs. Hardin above mentioned; she taking all marked in light purple except the west half of the south-east quarter of Section 30. A red line is shown on this Map 16, drawn north and south through the center of south-east quarter of Section 30, squared out, to show the part west of which the lands of Gertrude H. Hardin would not upon this record extend. Only the part in light purple east of said red line would go to Mrs. Hardin as a part of the tract acquired by her under the Egan patent.

The judgment in *Hardin* v. *Jordan* did not involve any of the land marked in purple, lettered (b), but only the land marked in pink and further designated by the use of (A) (A) (a) (a) (a) (a). The Circuit Court of Cook County, when hearing this case, after it had been remanded by the Superior Court of the state, declined to admit in evidence a transcript of the judgment just noted. This was because the court decided to take the

case upon the evidence which was heard and considered by the court in rendering the decree herein of August 10, 1892. (Record, 435.)

The transcript, however, was proper evidence, and precisely in line with the evidence which the defendant in error Shedd previously proposed in setting up and relying upon the judgment in *Mitchell* v. *Smale*. (Record, 52-55.)

XV.

THE GOVERNMENT PLAT AND FIELD NOTES SHOULD GOVERN IN THE APPORTIONMENT. THE LANDS WERE PATENTED TO JOHN HOLBROOK, WILLIAM B. EGAN, STEPHEN A. DOUGLAS AND HORATIO B. DEWITT, ACCORDING TO THE PLAT.

ALL THE PARTIES TOOK TITLE IN RESPECT TO THE LANDS BORDERING ON THE LAKE.

The plat of the survey of 1834-5 had governed the parties in this case up to the beginning of this controversy.

It corresponds with the field notes.

> "The field notes and plat of the survey of the public lands are presumed to be correct until the contrary is shown."
>
> *O'Gilvie* v. *Copeland*, 145 Ill., 98.
>
> *Town of Kane* v. *Farrelly*, 192 Ill., 521.

There is no such material variance between the plat and the evidence of topography as should cause a qualification of the plat. The evidence of topography is mainly of recent years, in which much change has come.

It is true that in the contest raised by claimants under the survey of 1874 a strong effort was made to show that there was omitted land in the original survey and platting.

At first the claimants under the survey of 1874 asserted that the meander line should be considered as a boundary. Alternatively, they argued that there was omitted land over which the meander line passed; their contention being that there was omitted land within the meander line, and especially between the south-west fractional quarter of Section 20 and Fractional Section 29 and the east fraction of the south-east fractional quarter of Section 30.

The survey of 1874 treated the lake as one, and merely sectionized it within the meander. It was not ordered upon any theory of there having been fraud or mistake in the original survey and platting, but solely on the theory that the meander line was a boundary, and that the lake bed within the meander was reserved by the United States in the sale of the lands bordering on the lake. Both these theories failed in the view of this court, and also in the view of the Supreme Court of the state; and the claimants under the survey of 1874 adopted, as a final resort, the theory that there was omitted land; which theory was also found to be unavailing to them.

The survey of 1834-5, and the plat thereof under which the bordering lands were sold by the government, have been sustained in all material particulars by this court, and by the Supreme Court of the state.

It nowhere appears that the surveyor made any mistake in setting posts at the several points mentioned in

his notes as being at the intersection of the lake. In indicating points to which his lines extended, and at which he set posts, he used words as follows: "Intersect south-easterly margin" (of lake), "south-easterly margin," "south-west bank," "south-west side," "bank of lake," "west side," "north-westerly margin," "south-western margin," "northern margin." These phrases are taken from the notes of June 17, 1834. (Record, 65-70.)

The notes of the meander of the lake under said date are shown at pages 68-70 of the record, and the notes of the resurvey of part of the meander were dated March 5, 1835. (Record, 70.)

There was much testimony as to the strip of land which in the subsidence of the waters of the lake in late years caused a separation of the lake into two bodies; the westerly body having come to be known as Hyde Lake, which, however, at the time of the hearing had so far diminished as to be divided into small, shallow ponds. (Record, 344, 363.) The testimony of the surveyors, and the maps introduced to show the elevation of the strip with reference to datum, had an incidental bearing on the question as to the extent to which it would be uncovered by the water of the lake at certain stages found at different times. It was aimed by defendant Jordan, in common with the other claimants, of the lake bed under the survey of 1874, to show that much, if not all, of the strip was omitted land in the survey of 1834-5; but the great preponderance of evidence sustained the survey and demonstrated that there was neither fraud nor mistake in the survey.

On the final hearing in the Circuit Court of Cook County the learned judge presiding therein adopted as

being equivalent to findings of fact by the Supreme Court of the state the recitals in regard to topographical matters given in the report of *Fuller* v. *Shedd*.

In that report (Record, 462), is a statement that the lands of Charles B. Shedd and of Gertrude H. Hardin were surveyed for the United States in 1834-5, and were adjacent to a lake, partly in Indiana and partly in Illinois, known as Wolf Lake, and that they were meandered on the lake.

As to the strip of land which at low water divided the lake into two parts, as before stated, the statement in the report in one place is as follows:

> "Between Fractional Section 29 and fractional south-west quarter of Section 20 owned by Shedd, as shown by the evidence, there existed at the time of the original survey a ridge which was but slightly covered with water, and at several points along this ridge islets existed, one having trees growing thereon. * * * At different seasons of the year, as early as 1841, the ridge was often above the level of the lake, and in the course of a few years the ridge materially increased in width and was above the level of the water at ordinary stages. The land on the ridge and around the margin of the lake thus above the mean level of the lake existed in 1874, at the time the circular was issued by the General Land Office for the second survey." (Record, 464.)

Later, in the opinion by Mr. Justice PHILLIPS, occurred these expressions as to the ridge:

> "From the north-east corner of the south-west quarter of Fractional Section 20, * * * there extended in a southerly direction a ridge. From the south-east corner of fractional south-east quarter of Section 30, and the south-west corner of Fractional Section 29, a ridge extended in a northerly direction. The extent to which this ridge projected from the north was about 220 rods and the extent of the

projection from the south was about 160 rods. The width of these ridges varied, at some places being twenty-eight rods wide and at others wider, and they were dry land at ordinary stages of water. At other places they were still narrower. This was the case at the time of the original survey. Along these ridges, in their projections from the north and south, trees of different varieties grew, some of which were three feet in circumference. These points, at their extremities, were about eighty or ninety rods apart, and between them, and along the sides of the ridge and around the margin of the lake within its meandered line, reeds and coarse grass grew in the water. In the marshy depressions between these points were two islands, one a mere knoll, the other containing about one or two acres, on which trees and bushes grew. This was substantially the physical condition, in ordinary stages of water, at the time of the 1834 and 1835 survey." (Record, 467.)

The opinion added:

"The level of the waters of Lake Michigan at a certain stage was adopted as a starting point of levels in Cook County. The extreme rise and fall of that lake is from five feet above datum to one foot below datum. The level of the waters of Wolf Lake, when the same reach about the meandered line of the original survey, would be about 2.2 feet above datum. Whilst in the original survey this Wolf Lake was by the field notes designated a navigable lake, it was not navigable in fact. Such being the surrounding conditions at the time of the original survey, the changes from that time to the survey of 1874 were not great, such as existed resulting from the slow filling of the lake bed, and from other natural causes. Since the survey of 1874, by reason of the improvement of the Calumet River and the wearing out of deeper natural channels from the lake and an increased flow therefrom, and the same natural causes continuing to raise the bed of the lake,

there has been a recession of the waters, causing dry land on both sides of the ridge, and around the borders of the lake." (*Ib.*)

The expressions of the opinion, when carefully considered, show that there was originally but one lake, with a shallow part, "but slightly covered with water," but with "islets," "an island" and "a mere knoll," though in time it became a ridge, or part elevated above the water level.

Such is the evidence, and only in recent years, according to the evidence, did the western part of it come to be known as Hyde Lake, the whole having for a long time been known as Wolf Lake.

The opinion by Mr. Justice Phillips in the aforesaid topographical statements probably followed to a considerable extent the findings of fact by his Honor, Judge Gresham, in *Hardin* v. *Jordan, supra,* as expressed in the report of that case in this court. Such findings are not in the present record.

The findings, as a whole, were as to conditions in 1885, which was the time of the trial, as was noted by his Honor, Judge Tuley, in the Circuit Court of Cook County in his first decision of this case. (See opinion given in the appendix hereto, page 199, *post;* the opinions of Judge Tuley being appended as per stipulation.)

Upon the pleadings, matters as to the ridge stand thus:

In the amended answer of Gertrude H. Hardin, in 443 B. R., it was said:

> "It is sometimes claimed as to the body of water shown on such plat as a lake that at the time of said original survey there was a narrow spur or promontory of land extending in a south-westerly direction from what is shown by the said plat as the southwest fractional quarter of Section 20."

In describing this spur *with reference to the time of the commencement of this suit,* the answer said it

> "extends about half way across the space shown by the plat as covered by a 'navigable lake' towards the point of land comprised of the east fraction of the south-east quarter of Section 30 and Fractional Section 29, as shown by the said plat, with the exception that about half way down the extent of said spur of land stretching from said Section 20 as aforesaid, there was an opening or space through which the water passed at ordinary stages so that at such stages of water the lower part of what at low water was a continuous spur of land or promontory would be an island, a considerable portion of which would be subject to entire submergence in times of high water. Said promontory thus extending into the water much like a dorsal fin of a fish, was extremely narrow, in some places not to exceed ten or fifteen fet in width, and in some places narrower; * * * in many places in ordinary stages of water entirely submerged, and the greater part subject to entire submergence in higher stages of water, and the whole of an area, if unsubmerged in part, or otherwise at the time of the original survey, entirely insufficient to warrant the cost of meandering and estimating its area at the price of government land at $1.25 per acre."

It was averred in the answer that with the water in Wolf Lake standing at 1.8 feet above datum, or at the average water level of Lake Michigan, "the water extends approximately to the marginal lines of said Wolf Lake at the time of the making of the original survey" as "exhibited in the plat thereof." Also, that the "true shore line of" the lake "was shown with substantial correctness upon" the government plat, and "that such was the true shore line thereof at the time of the purchase of said John Holbrook."

The pleading made reference to shallowing influences, yet maintained there was yet in fact but one lake. (Record, 27.) The statements of this answer being by reference adopted in the cross-petition of Gertrude H. Hardin (Record, 39), the answer of Mr. Shedd thereto admitted upon information and belief the allegations in the "cross-petition as to the narrow spur or promontory extending in a southerly direction from the south-west fractional quarter of Section 20, and the one extending north from Fractional Section 29." (Record, 50.)

Neither the answer of Gertrude H. Hardin nor her cross-petition spoke of any spur or promontory extending northward from Fractional Section 29, but only of "the point of land comprised of the east fraction of the south-east quarter of Section 30, and Fractional Section 29, *as shown by the said plat.*" (Record, 26.)

The shallowing of the lake, as is explained in the statement at the head of this brief, was marked after the beginning of the work by the government in deepening and improving the navigation of the Calumet River, which work began in 1869.

There was but one lake at the time of the sale of the bordering lands. Such sale began as early as June, 1836. (Record, 91-2.) The purchase by John Holbrook, the father of Mrs. Gertrude H. Hardin, was December 24, 1838. (Record, 246.)

There was no claim in the pleadings on the part of Mr. Shedd that at the time of the making of the surveys from which the government plat was made, the fractions which are the basis of his claim were larger than as is shown on the plat. Nor is the correctness of the meander questionable under the evidence. Certainly, on the

westerly and southerly border of fractional south-west quarter of Section 20, there having been a second meander (the first one having been made June 17, 1834, and the second one made March 5, 1835) (Record, 70), it would not seem to be at all probable that there was any error.

At the former of such surveys the notes closed with the statement, "land all marsh; water from six inches to three and a half feet deep."

This is to be understood as relating to the eight courses given in the re-survey as in the former survey. (Record, 70, 408.) It was so explained by Surveyor Greeley (Rec., 413), and also by Surveyor Rossiter (Rec., 338).

Mr. Greeley explained that he understood by the expression above quoted as to marsh and water, that "it relates to the land over which the surveyor passed, that is, "those nine (eight) courses in the fractional quarter (half) section." It is a "general remark about that which those courses pass through."

The government plat should be taken to be correct, and what there was of the lake as platted is subject to be apportioned among the shore proprietors, and, of course, any island or land within the lake would be included as if a part of the upland fronting the same on the lake; as in

Webber v. *Pere Marquette Broom Co.*, 62 Mich., 626.

Houck v. *Yates, supra.*

Middleton v. *Pritchard, supra.*

President, &c., of Commons v. *McClure, supra.*

Kirkpatrick v. *Yates, supra.*

Grand Rapids, &c., R. R. Co. v. *Butler,* 159 U. S., 87; (40 Law. Ed., 85).

"All islands, relicted land, and the soil of inland non-navigable rivers and streams * * * belong to the proprietors of the estates to which such rivers act as boundaries."

Schultes on Aquatic Rights, 138, quoted and approved in

Tyler on Boundaries, 94.

Admirable as was the suggestion of his Honor, Judge Gresham, in *State of Indiana* v. *Milk, supra*, that "resolute good faith should characterize the conduct of states in their dealings with individuals;" the remark should be turned towards non-intervention by the state in a case like this. Such intervention is suggested in the State Court as under a change of policy, after the state has grown so greatly under a policy consonant with the common law, and after the land has long been taxed as private property. Why should the state intervene when, if it were supposable that the meander was on the supposition of the lake being navigable, that supposition has been found to be erroneous as to every part of the lake, in Indiana as well as in Illinois?

There does not seem to be any reason why there should be hesitancy in according to purchasers from the United States of lands bordering on small non-navigable lakes the usual proprietorship over the submerged land fronting the same, as is done in respect to the land in streams. In the latter, so far as Illinois is concerned, the cases will show large bodies of land held to be a part of the shore tracts bounded by the rivers in the state. But the principle maintained is that which was suggested in *Mitchell* v. *Smale, supra*, the

"lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the

> description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water regularly follow."

Correct observations were made by this court in *Mitchell* v. *Smale, supra,* as to the object of running meander lines. They are run for the purpose of getting its (the land's) general contour, and of measuring the quantity to be paid for.

> "The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusion and inclusion of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream."

XVI.

THE RULINGS OF THIS COURT SHOULD HAVE CONTROLLED THE STATE COURT, AND SHOULD NOT HAVE BEEN DISREGARDED.

The part of the lake to be apportioned or divided in this proceeding is as represented in Map 16, *ante.* It is comprehended within spaces which are readily identified.

The direction given in *Hardin* v. *Jordan, supra,* at the close of the opinion in respect to the right of the plaintiff in that case to judgment as to south-east fractional quarter of Section 19, and north-east fractional quarter of Section 30, to the center of Wolf Lake, covers the whole space from the meander line eastward of those tracts to the line of the State of Illinois, the latter line being taken to be the center of the lake, as per Judge Tuley's first decree. (See his opinion, p. 216, *post.*)

As this court decided, the supposed narrow tongue of land which, according to the finding of facts in that case projected, at the time of the findings, into the lake from the north side, should not "*have any effect upon the decision of this case. It does not appear to have extended far enough southerly, at least, during high water to be opposed to the property of the plaintiff;*" and this court in that case approved in this respect of the decision in *Forsyth* v. *Smale,* 7 Biss., 201.

The court also said the plaintiff in *Hardin* v. *Jordan, supra,* was entitled to judgment "to the middle of the bay or projection of said lake in front of the east part of the south-east fractional quarter of said Section 30." This last mentioned matter is also readily adjusted under the decision of this court, as is shown in Map 16, *ante;* the part in pink, marked (a) being attached to said fraction marked (A); the part (b) in purple, lying east of the north and south center line of the quarter section shown by the line drawn in red passing to Mrs. Hardin derivatively, by mesne conveyances, under the Egan patent.

The principle applied to the bay last mentioned, marked on this map "South Bay," is also applicable to the

part marked "North Bay." This is to be done by attaching to the fraction owned by Mr. Shedd in south-west fractional quarter of Section 20, marked (D) the part in green marked (d). And so as to the fraction in south-east quarter of Section 20 marked on this map (E): It is to take the part marked (e) in buff, bounded on the south by the line marked "South line of Bay," which line is drawn from the south-east corner (on the lake margin) of the tract; that corner having been fixed in the government survey, first by a "temporary post" (Record, 70), and secondly by a "post," the water being there "too deep to raise a mound." (*Ib.*)

The suggestion as to the apportionment as between the tracts (D) and (E), is believed to be fairly illustrative of the method of division as between the owner of (D) and the owner of (E); though the latter tract is not directly involved in this case, except that as between plaintiff in error Gertrude H. Hardin and the owner of that tract, the principle applies that this part of her tract goes but to the center of the bay. If any question should arise between the owners of tracts (D) and (E) as to the length of their respective lines on the center line of the bay, it may be adjusted between themselves. Such question, should it arise, could not affect the rights of the plaintiffs in error, nor change the center boundary between tracts (d), (e) and (a), nor the south boundary of tract (e).

The rule of apportionment stated in *Kehr* v. *Snyder*, 114 Ill., 313, 316, is appropriate; though the process of division in that case was evidently much more complicated than in this case; for here there are but few tracts to be considered, and the area is of such form that the division is comparatively easy, with but little occasion for

convergence of lines. As stated in that case, the length of shore line or lake front of a congressional subdivision being found (the general length from corner to corner, disregarding sinuosities), a line would be drawn opposite thereto at the other extreme of the part to be apportioned, and this line would be "measured into as many equal parts as there are lineal feet in the shore line, giving to each proprietor as many of these parts as his property measured feet on the shore line." Side or division lines running into what was originally the lake would be drawn between the two corners of each tract on the shore line and the two points or corners on the opposite or measured line, thus designating the lot or parcel belonging to each proprietor.

A near approximation to the length of the line in the lake or bay, as to each tract, can be made without difficulty.

The several patents referred to the official plat of the survey of 1834-5. The field notes and plat became a component part of the description. The plat should, as between the parties to this case, have been taken to be correct. This proves that at the time of the survey there was but one lake.

The original decree of the Circuit Court of Cook County considered the propositions with reference to extension to the center of the water, mainly under *Hardin* v. *Jordan, supra,* and *Mitchell* v. *Smale, supra.* The later decree now under review, considered, under such evidence as the record previously contained, what were accretions. The chancellor's conclusion in the former instance is shown at pp. 416-424 of the record.

In decreeing to Mr. Shedd any land either north or

west of the corner on the sectional line between Sections 29 and 30, fixed in the government survey as being "*at the bank of the lake,*" there was a departure from the right principle. This was so in giving his tract an undue extension northward upon that line; and there was error in not regarding the principle of lateral extension from the shore tract in extending side lines into the lake. His bounds were first extended northwardly into the lake, so that his shore line was greatly elongated, when the evidence showed no mistake in the survey; and from this method of enlargement he was allowed to have extension of his original tract into the lake westerly as well as easterly. As an explanation to some extent, Judge Tuley, in his opinion, remarked that he found from the evidence that there was a ridge extending north in "varying widths to the north line of south-west quarter of 29 (p. 215, *post*); also that the east fraction of south-east quarter of Section 30 (Mrs. Hardin's tract) formed a part of this ridge." "How far to the north it constituted a part of the ridge" he was "uncertain from the evidence;" but he said, "I am satisfied that it did not go north of the north line of the south half of south-west quarter of Section 29;" and he said that would be fixed as its north limit." (*Ib.*, p. 215.) He had previously said "that there was some land not covered with water inside the meander line" (particularly in the south-west quarter of Section 20), "at the time of the survey of 1835; but it is impossible from the evidence to ascertain the exact quantity of such lands." Also that "the evidence failed to show that there was such an excess in quantity, over what the plat exhibits, as to show either fraud or mistake of the surveyor. (*Ib.*, p. 200.) He also said, "While the court will regard the evidence as to what land is above water as con-

trolling, yet where there is doubt, it should be resolved in favor of the shore owner to the extent at least of the lowest fraction into which the government subdivided lands." (*Ib.*, p. 215.) In another part of his opinion he said: "The Michigan and Indiana rule commends itself to my judgment" (*Ib.*, p. 213), probably supposing at the time that in Michigan as well as in Indiana it was "held that the patentee took all the lands in the fractional section, without regard to the number of acres specified in the patent." But he added that he construed the decision of this court in the *Hardin* v. *Jordan* case as in effect overruling the Michigan and Indiana rule. (*Ib.*, p. 213.) It is yet supposed that he was influenced by the Indiana decisions, in some measure.

With reference to any northward extension of Fractional Section 29, it is to be noted:

The field notes (p. 65, Record), show that the surveyor "set a post corner to Sections 29, 30, 31 and 32;" and he mentioned witness trees, at distances of 41 links, 98 links and 82 links, respectively. He added in his notes, "No tree near in Section 30." He next ran a line west, between Sections 30 and 31, 2.84 chains, where he intersected the south-easterly margin of the lake. He then sent his flagmen around the southern extremity of the lake, and "caused the flag to be set on the opposite side thereof on the line between Sections 30 and 31."

Omitting here the other calls on the westward to the south-west corner of the fractional township, his notes show (p. 66, Record), that beginning again at the corner which he had established as the corner of Sections 29, 30, 31 and 32, he ran east 5.97 chains and intersected the southwest side of the lake. The latter was the south line

of the fraction entered by Stephen A. Douglas. Beginning again at the corner of Sections 29, 30, 31 and 32, he ran north (p. 66, Record) 14.50 chains and intersected bank of lake, where he "set a post corner to Fractional Sections 29 and 30."

At the end of his notes concerning this call the surveyor said: *"As the remainder of this line is in the lake,* I commenced work at the corner of Sections 24 and 25." (*Ib.*, 66.) Fractional Section 29 had three corner posts, being all that the surveyor was required to fix, as he was only called upon to run section lines. Two of such corners, the south-east corner and the northerly corner, were at the margin of the lake; and these were two of the corners to the east fraction of the south-east fractional quarter of Section 30 (the Holbrook tract).

The two tracts were co-terminous on the north at the lake, with a common division line between them, running to the lake, while the frontage of the east fraction of the south-east fractional quarter of Section 30 is on the bay to the west thereof. A lateral extension into the lake of the fraction in Section 29 would be necessarily toward the east, while the lateral extension of the east fraction of south-east fractional quarter of Section 30, would be necessarily toward the west. It is an established principle that the line between the two tracts would be taken as co-extensive with the bounds of both of the tracts. One would be no longer north and south on that line than the other. Neither one was in fact longer on that line than was the other; and the north line of extension of each tract, one to the east and one to the west, must run from the established corner for each tract.

There is no reason for declaring in the face of the field notes and the government plat that the bay extended far-

ther north than is represented on the plat. It must necessarily follow that there is no sufficient reason for treating Fractional Section 29 as having extended as a body of land any further north than did the east fraction of the south-east fractional quarter of Section 30.

The line on the west side of Mr. Shedd's tract in Section 29 was the same as Mrs. Hardin's line on the east side of her tract, next west; not longer and not different.

According to the Act of Congress of February 11, 1805:

> "The boundary lines actually run and marked in the surveys returned by the Surveyor General, shall be established as the proper boundary lines of the sections or subdivisions for which they were intended; and the length of such lines, as returned, shall be held and considered as the true length thereof."

From the point of termination of the line actually run to the post set at a distance of 14.50 chains from the corner between Sections 29 and 30, the Act of Congress would require the boundary line to be ascertained by running from the established corner due north and south. This would be the division line between the two tracts as far as either might extend. Hence, it is not proper to give Fractional Section 29 any extension westward of that line; nor did the petition of Mr. Shedd claim any part of Section 30.

The meander tends to exclude the idea of extension northward of Fractional Section 29.

In running the meander, the surveyor's notes said, Starting at the corner of Fractional Sections 29 and 32, "thence from said corner * * * along south-west

margin of lake along Fractional Section 29," giving four calls of 10, 3, 4 and 0.71 chains, respectively, "to the corner of Fractional Sections 29 and 30." He added, "land —soil, third rate, very thinly timbered with yellow and burr oak." In the meander from the corner to Fractional Sections 29 and 30, along the southerly margin of lake," the notes say, "thence from said corner along the southerly margin of lake along Fractional Section 30, specifying three calls, to corner of Fractional Sections 30 and 31." He added, "land all marsh, unfit for cultivation."

Further as to topography Jordan's Exhibit 4½ (Rec., 172-3), Map No. 3, *ante*, represents the bed of the lake as shown by the government plat, north of these two fractions as being marsh at the time of the survey from which said exhibit was made, to wit: in 1883. This exhibit negatives the suggestion that Fractional Section 29 extended farther north in 1834 than is shown on the government plat. The same exhibit shows the line of a road bed extending north from the south line of Fractional Section 29, the making of which road was one of the causes of elevation of the part of territory over which the road was constructed.

As to the length northwardly of Fractional Section 29, Mr. Shedd, in testifying said: "There is some high ground on the south-west corner of Section 29. It extends, I should say, six or eight hundred feet, or more, perhaps, than that, north of it." (Rec., 73.)

Having said that this point was from the south-west corner of Section 29, the distance stated by him as to length is hardly as great as the length of the line run by the surveyor between Sections 29 and 30; such length being 14.50 chains, or 957 feet. (Record, 66.)

The marsh extended up to and beyond the "Field" house, sometimes known as the Fogli house, or "Elm Island." Water stood under that house in 1883 (Record, 373), although Field constructed the road and raised the ground by fills. (Record, 378.)

Fractional Section 29, with the east fraction of the south-east quarter of Section 30, extended north to the lake at one common corner for both tracts. The outlines of both tracts were shown on the government plat. All intervening space northward was and is to be regarded as lake, subject to the frontage rights of the several tracts on the west extended laterally into that space. This being a non-navigable lake any unsubmerged land within the lake would go to the shore owner under the patents from the United States.

"Each congressional subdivision situated on the lake" * * * "had the quality of a distinct side" in respect to frontage on the water. "Riparian rights extend laterally from the shore." (*Moore* v. *The Willamette Transportation, &c., Co.*, 7 Ore., 355.) They extend "by the side," "sidewise," "in the direction of the side." (Webster's Dictionary, defining "laterally.")

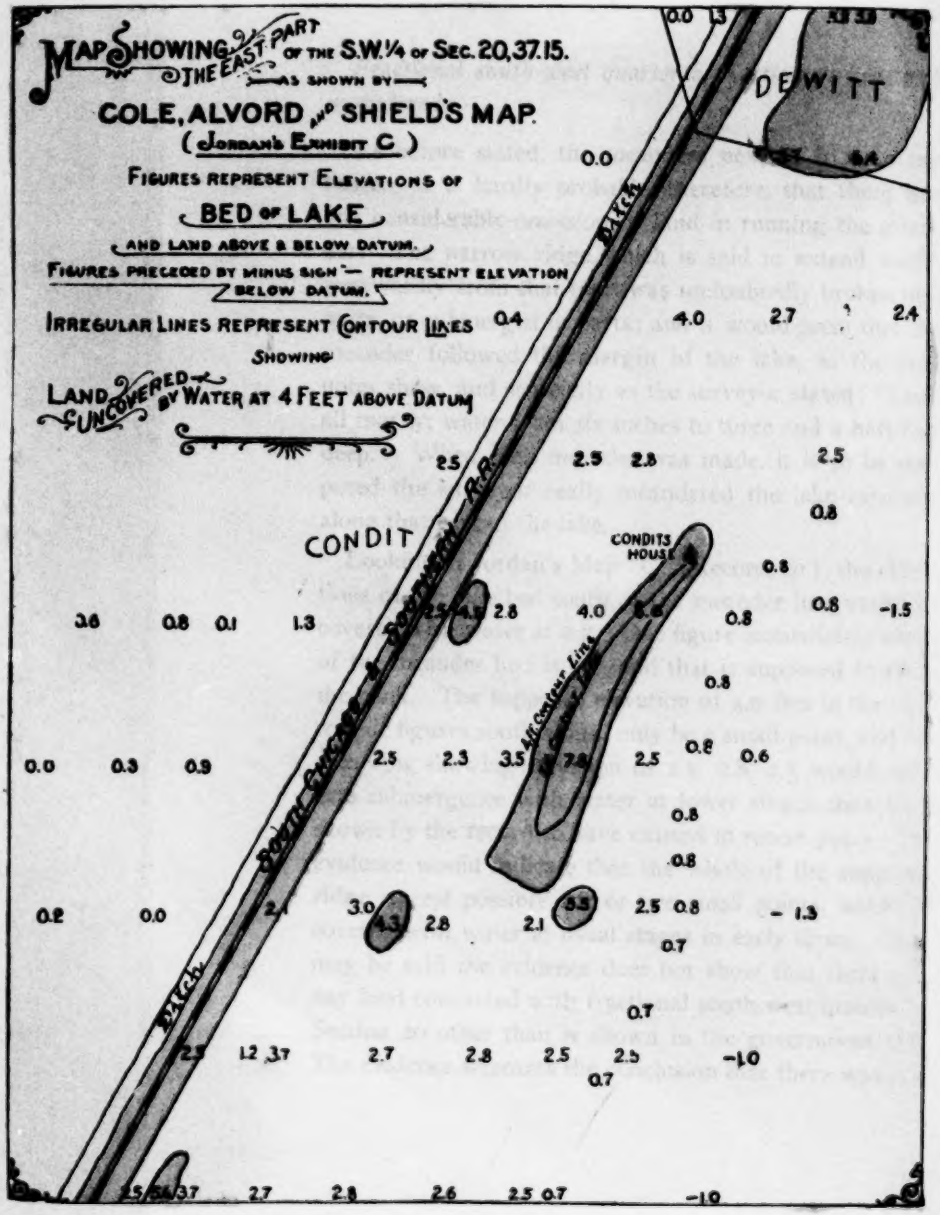
The decree departed from this principle in annexing to Fractional Section 29 certain islands (Record, 447), as passing by virtue of the patent to Stephen A. Douglas, and not under the law of accretions. In the departure there is a tacit admission that the tract did not in its original form have the extension claimed for it.

Fractional south-west quarter of Section 20 was well meandered.

As before stated, the meanders next to it were run twice. It is hardly probable, therefore, that there was any considerable omission of land in running the meander. The narrow ridge which is said to extend south-westwardly from that tract was undoubtedly broken into parts, or submerged in parts; and it would seem that the meander followed the margin of the lake, as the field notes show, and especially as the surveyor stated: "Land all marsh; water from six inches to three and a half feet deep." When each meander was made, it is to be supposed the surveyor really meandered the lake carefully along that part of the lake.

Looking at Jordan's Map "C" (Record, 91), the elevations of the lake bed south of the meander line would be covered with water at 2.7. One figure immediately south of the meander line is 5.7, and that is supposed to be at the bank. The supposed elevation of 4.0 feet in the next row of figures south would only be a small point, and the next row showing elevation of 2.5, 2.8, 2.5 would indicate submergence with water at lower stages than were shown by the record to have existed in recent years. The evidence would indicate that the whole of the supposed ridge, except possibly one or two small points, would be covered with water at usual stages in early times. So it may be said the evidence does not show that there was any land connected with fractional south-west quarter of Section 20 other than is shown in the government plat. The evidence warrants the conclusion that there was not.

MAP No. 9.


MAP SHOWING THE EAST PART OF THE S.W.¼ OF SEC. 20, 37. 15.
AS SHOWN BY
COLE, ALVORD AND SHIELD'S MAP.
(JORDAN'S EXHIBIT C)
FIGURES REPRESENT ELEVATIONS OF
BED OF LAKE
AND LAND ABOVE & BELOW DATUM.
FIGURES PRECEDED BY MINUS SIGN — REPRESENT ELEVATION BELOW DATUM.
IRREGULAR LINES REPRESENT CONTOUR LINES
SHOWING
LAND UNCOVERED BY WATER AT 4 FEET ABOVE DATUM
DEWITT
CONDIT
CONDITS HOUSE
SOUTH CHICAGO & SOUTHERN R.R.
Beach
Beach
4 Ft Contour Line
0.0
0.4
4.0
2.7
2.4
2.5
2.8
2.5
0.8
0.8
0.8
-1.5
3.6
0.8
0.1
1.3
2.5
2.8
4.0
0.8
0.8
0.0
0.3
0.9
2.5
2.3
3.5
2.5
0.8
0.6
0.8
0.8
0.2
0.0
2.1
3.0
2.8
2.1
2.5
0.8
-1.3
0.7
0.7
2.5
1.2
3.7
2.7
2.8
2.5
2.5
-1.0
0.7
2.5
3.7
2.7
2.8
2.6
2.5
0.7
-1.0

Map No. 9 herein shows any land that would be uncovered with water at 4 feet above datum, a stage of water less than was observed by Mr. Shedd (Record, 404), and by his business associate, Mr. John S. Field. (Record, 3[illegible].)

Map No. 4, *ante* (Record, 267), shows elevations of water found when surveying the line for the South Chicago and Southern Railroad; at some stages during which survey Mr. Craig, the engineer in charge of the work, said there was left but little land within the meander, though he added, *"Now and then you could see a little of the ridge peeking out."* (Rec., 279.) The table of elevations (Rec., 322) prepared by Surveyor Rossiter, which elevations were observed by him when performing functions mostly disconnected with the present case, shows stages sufficient to separate and cover the ridge largely, especially within and near the meander in south-west fractional quarter of Section 20, as well, also, as north of Fractional Section 29; elevations of the ridge shown by Map "C" being generally less than the stages noted by Mr. Rossiter. Of course any submerged land south of fractional south-west quarter of Section 20 would be regarded as a part of the lake in extending side lines laterally from the shore tracts. Such submerged land would not, if it afterwards became unsubmerged, interrupt the extension of the side lines into the lake proportionate to the shore lines as exemplified in Map 16 *ante*. Nor would unsubmerged areas, islands or islets, interrupt such extension of side lines.

If it be said that the south-west fractional quarter of Section 20 should be found to have a shore corner farther south than is supposed in Map 16, *ante*, such corner being as far as the meander, it would, of course, be incumbent upon the owner of that tract to show that the land ex-

tended farther into the lake than as shown on the government plat. This gives rise to the question whether there was really such extension into the lake when the original survey was made; for all the parties bought according to the plat of such survey.

In looking at Jordan's Map "C" (Record, 90, 91), a narrow strip, in light brown color, appears at the meander line which was run in front of fractional south-west quarter of Section 20. Two elevations are shown, one of 6.4 feet north of the line, and the other 5.7 feet south of the line. The elevations as shown were found in 1886-1890, not 1834 nor 1835; and the water line may have been high enough in the earlier period to cover the space adjacent to or next south of such elevations. The land may have been much lower south of the meander line, as the next figures south are 4 feet and 2.7 feet, elevations likely to be submerged at medium stages of water at the time of the survey. The meander crossed lower elevations of the lake bed before reaching the north and south center line of Section 20.

Shedd's Exhibit, Jordan's Map "C," purporting to represent surveys from 1886 to 1890, is subject to much criticism. The colors to represent topography in contour lines for each foot of elevation do not correspond with the figures thereon. The contradictions are so numerous and the contour colors and figures are so conflicting, that the map has no value as a contour map. It is highly deceptive and misleading. The light blue is said to represent water at datum; the figures in the light blue ground showing the depression of the bed below datum. The map is but theoretical. It was constructed from different surveys, covering much lapse of time. It does not represent the water as it actually stood at any sur-

vey; much of the land being covered with water at such times. (Record, 185.) Inspection of the map will disclose conflict between the so-called contour lines and the elevations stated in fractions or in feet. Instances of such conflict could be pointed out. For example, there are figures, 1.5 (meaning below datum) east of the "Condit House," which figures are within the belt representing, according to the coloring and contour lines, area one foot above datum. In the same belt east of the name "McDaid" 1.4; south of the cut south of "Field's House" 1.2, 1.3, 1.3.

From the top of the map southward in the next belt of two feet above datum are numerous higher figures, some being 3.0, 4.0, 4.7, 3.0, 4.0. The contradiction extends throughout the entire map. In fractional Section 29 and east fraction of south-east quarter of Section 30, there is so much confusion as to baffle understanding. Similar confusion exists in south-west fractional quarter of Section 20.

Mr. Shields, under whose supervision the map was constructed, said, when his attention was called to the elevations shown on the map south of the meander in south-west quarter of Section 20 as 2.7, 3.0, 2.1, that the stage of water noticed by him (it being 3½ above datum) would overflow all elevations below that figure. (Record, 198-9.) The map does not show the road constructed by Solomon Field, which was raised by filling north and south through the strip shown as separating the lake into two bodies. The elevations shown north of the point comprising Fractional Section 29 and the east fraction of the south-east fractional quarter of Section 30, being 4.0, 4.7, may be considered as being on the road, the elevations on each side of those given being much lower.

As to the conditions south of the shore line of the lake in front of the fractional south-west quarter of Section 20.

Mr. Shedd, the defendant in error, testified that south of the name "Condit" on Map "C" (Record, 91), the lightest colored portion would represent the highest portion of the ridge which in most ordinary stages of water is dry. At the termination of the ridge shown on the Map "C" a short distance south of the Condit house, he said there was a natural depression in which he had seen the water stand, the ground being wet and swampy. Further south he said there is more high ground, where the name "McDaid" appears. (Record, 72-3.)

Mr. Shedd further said:

> "In extreme high water I think that about all that ridge would be covered with water. I have seen water there so high that I think very little of it would show out of the water. I didn't go on it at that time. I don't think it would have been possible to get there except by boat, but in ordinary stages of high water I should say that the whitest portion, as indicated on the map, was probably above water."

The whitest portion referred to by Mr. Shedd is the narrow strip south of the Condit house, where the elevations are given, 8.1, 8.6 and 7.8, the small area south and west of the name "McDaid," where the elevation of 5.0 appears, and the small narrow strip extending north from the south line of Fractional Section 29, the elevations there shown being 6.9, 5.3, 5.7, 7.7, 7.4.

Mr. Shedd introduced divers witnesses to show the depression south of the name "Condit," and the marshy conditions existing there. This observation includes the

testimony of Mr. Rossiter, called by Mr. Shedd (Record, 369), John S. Field (Record, 367), Joseph M. Spahn (Record, 385).

Mr. Shedd's Exhibit, Map "C," shows this break or depression.

The area south of the break, and where the name "McDaid" appears, is known in the record as "Crescent-Shaped Island." (Record, 286.)

Mr. Shedd introduced witnesses by whom it was shown that the lake often covered the marsh space south, and also north, of Elm Island, the crossing of the same being made by boat. (Record, 373-80, 360-1, 390-1, 397-8, 403-4), and other witnesses testified as to water covering this space. (Record, 352-6, 357-8, 345, 288-9.)

For reasons of doubt, such as were advanced by the chancellor, as to the amount of land unsubmerged at the time of the survey, neither of the fractions of Mr. Shedd should be enlarged at the expense of other tracts, and to the exclusion of those from extension to the center of the lake.

The question of extension was to be resolved by the conditions existing at the time of the survey. Such survey became a fixed fact, and the only question to be determined thereunder is, Was there any land which can be claimed as having been embraced within the survey, and which is attachable to any particular tract as having been an actual part thereof at the time of the survey? Elm island, when it became such, lay entirely outside of Fractional Section 29 and its extension east to the center of the lake. Equally when unsubmerged as when submerged it was within the lines of extension, or regular side lines, of the west fraction (west of lake) of the

south-east quarter of Section 30, and the north-east fractional quarter of Section 30. The highest elevation upon the island being 4.2 above datum, it was undoubtedly, from the evidence of the elevation of the water as disclosed by the field notes, submerged in 1834; and the record discloses frequent submergence in recent years.

The recognition by the surveyor of the point comprising Fractional Section 29 and the east fraction of the south-east quarter of Section 30, extending into the lake, is fairly illustrative of the faithfulness of the survey. Like observation will apply to south-west fractional quarter of Section 20, where it appears that the surveyor deflected his course in running the meander, thus noticing the small elevated area comprising that fraction.

Map No. 8, shown herein, represents the division of supposed accretions under the decree of August 11, 1897, which was affirmed by the Supreme Court of the state, and is herein challenged.

The strip awarded to the Cook County Canal and Dock Company was 400 feet in width north and south, immediately north of the south line of south-east fractional quarter of Section nineteen (19), and extending across that quarter section, and far enough east to reach the waters of Hyde Lake. The strip is not separately shown on this map.

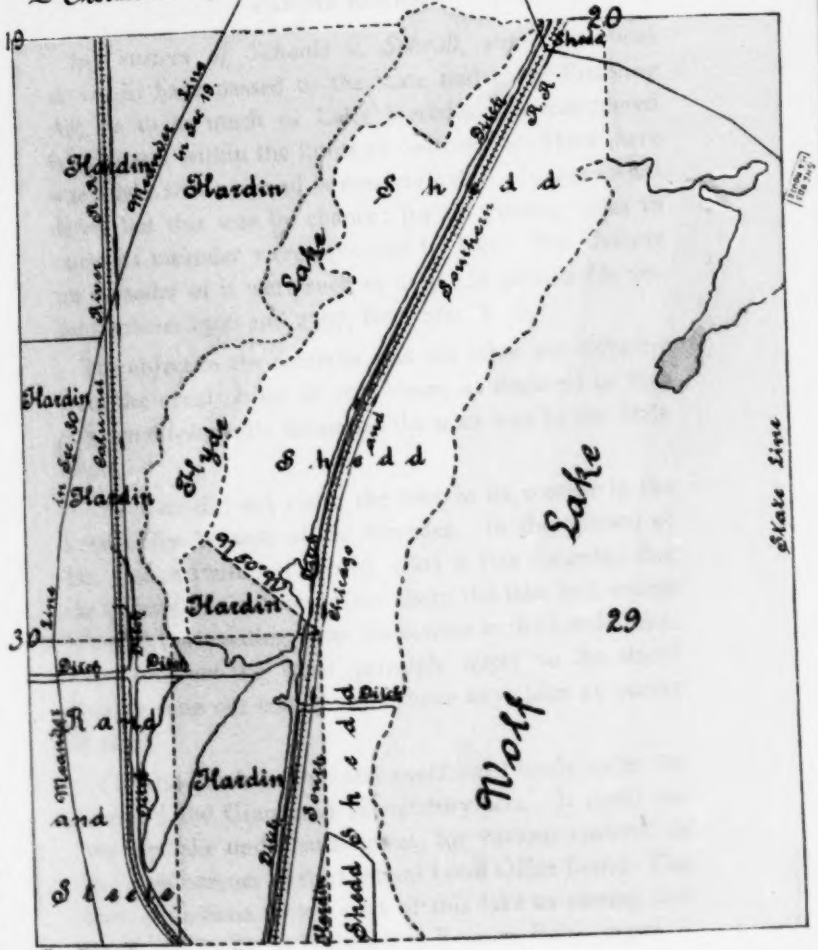
The representation of Hyde Lake did not correspond with the time of the said decree. Evidence to show a drying up of Hyde Lake since the former hearing was offered. (Record, 432, 484-5.)

MAP No. 8.

Map

showing divisional lines under decree of Aug. 11th 1897.
applied to Jordan's Map D. supposed to represent
Hyde Lake as of Sept. 26th 1891.

~ Elevation of water 0.37 ft. above datum:


19
20
Hardin
Hardin
Shedd
Lake
Hyde
Lake
29
Wolf
Shedd
Hardin
Hardin
Hardin
Hardin
Hardin
Shedd
Shedd
Shedd

XVII.

NO TITLE IN THE STATE TO THIS NON-NAVIGABLE LAKE CAN BE SHOWN.

In *Trustees of Schools* v. *Schroll, supra,* title was shown to have passed to the state under the Enabling Act, as to so much of Lake Meredosia, a meandered lake, as was within the limits of Section 16. Here there was a lake that was and is non-navigable. It was meandered, but this was by chance; for no guiding rules to cause its meander were provided by law. The chances for meander of it were such as might be permissible under Sections 2396 and 2397, Rev. Stat. U. S.

The object of the meander was not other nor different from the usual object in such cases, as declared by this court, and frequently defined in the same way by the State Court.

The state did not claim the lake in its contest in the Land Office because of the meander. In the opinion of Mr. Justice Phillips (Record, 480) it was conceded that the County of Cook could not claim the lake bed, except in a direct proceeding, after the contest in the Land Office. Why does not the same principle apply to the state? Neither state nor county could have any claim as matter of right.

The state took swamp and overflowed lands under the Swamp Land Grant and amendatory acts. It could not take this lake under such grant, for various reasons, as the Commissioner of the General Land Office found. The State of Indiana took a part of this lake as swamp and overflowed lands, as is shown in *Kean* v. *Roby, supra.*

Patents for the land bordering on the Illinois portion of the lake were duly issued by the United States. The effect of those was to give the shore owners each a distinct interest in the bed of the lake, corresponding with the shore fronts in relative proportions according to the common law. This court ascertained and declared the law of the case. The Supreme Court of the state should have recognized the right of this court to declare the effect of the patents. Good faith on the part of the state in making a present claim for the lake could not be shown, especially after the action taken under the Swamp Land Act, the contest in the Land Office and before the Commissioner of the General Land Office, and the taxing of the property by the state.

This court rightly determined for itself what was the common law. It need not be driven from its position on the subject by anomalous and inconsistent rulings, the later of which do not accord with other decisions as to the object of a meander in surveying.

Many considerations entitle the plaintiffs in error to a decree holding their tracts to extend to the center of the lake and bay, respectively.

There having been in the first instance but one lake, and all having bought according to the plat, there is no right nor occasion for treating the property as having been on a minor body of water, because it has become detached in the course of time.

Nor does the policy of the state, as shown in the Acts of the General Assembly concerning Fish, require any modification of the common law.

Mr. Justice Phillips, in the opinion (161 Ill., 489) (Record, 478), said: "The policy of the state in recent

years has been to stock its waters, both lakes and streams, with fish." As to this the legislation of the state did show provision for a Board of Fish Commissioners, to be appointed under the Act of 1879, with authority "to select suitable locations for state fish hatching and breeding establishments;" and the Act gave authority to the commission to take measures "for the introduction of new varieties of food fishes into the public waters of the state;" but this did not entitle the state nor the commissioners to take private property. The more extensive acts of 1897 and 1899 are but an exercise of the police power. They do not derive any force from a claim of this lake on the part of the state, and there is nothing in the record to show that it is suitable for fish hatching or breeding. Its vanishing proportions, and its likeness to a swamp in any part which still has water in ponds, except as a part is artificially sustained by Mr. Shedd and other ice men for the cutting of ice, indicate that it would be a very poor place for fish.

The paternalism seemingly favored in the opinion by Mr. Justice Phillips, in diminution of the rights of shore proprietors who had to contend so much to protect themselves against the claimants under the survey of 1874, had not budded when the contest was heard in the Land Office; and it has scarcely budded yet, certainly not to any appreciable extent. But the state, at the time of the contest, would have given the overflowed land over to the county, under the Swamp Land Grant, and it would have passed very soon into private ownership, as did the swamp and overflowed lands, including the part of this lake which is in Indiana. Such was then, as always before the decision of this case, the policy of the state.

The state, following purposes of the grant under the

Swamp Land Act, had a larger and better policy than that which is favored by the opinion. The policy of the state was to allow the reclamation of the swamp and overflowed lands, and have them held for individual use and private ownership. The policy announced in the opinion by Mr. Justice Phillips would have subverted the object of the Swamp Land Act. Under his suggestions, a few hogsheads of water in a former meandered lake, although in depth insufficient for boating or for fishing, would control as to ownership, and keep the title in the state, without any advantage to anybody.

Apply the principle, for example, to Wolf Lake, the western part of which (Hyde Lake) was at the hearing divided into ponds, the water in which, as shown on Shedd's Exhibit, Map "C," had but a few inches in depth, while the eastern part (Wolf Lake) was kept at an artificial stage for the formation of ice; yet if the state in its sovereignty held title, it would be beyond the reach of private enterprise or development, although within the limits of a great city.

THERE IS MORE HERE THAN A MERE QUESTION OF BOUNDARIES. IT IS A QUESTION OF LEGAL RIGHT AS WELL AS ONE OF PROPORTIONS.

In the different aspects, it was not regarded rightly in the decree finally affirmed by the Supreme Court of the state. By such decree the defendant in error has added to his fractions of 4.53 acres and 7.37 acres, respectively, on account of an original frontage of about $\frac{3}{8}$ of a mile, about 320 acres, or perhaps more, as supposed accretions, such area being subject, also, to be much increased if Mr. Shedd's Ice Company should cease pumping water into

the lake, while the plaintiffs in error, with an original shore frontage exceeding 1¾ miles, were allowed to hold as attaching itself to their tracts but about 180 acres. This was violative of rules requiring account to be taken of the extent of the shore frontage of the several congressional tracts, and a consideration of proportions of area attachable to the same.

It will be argued that the disproportion, in attaching so much to Mr. Shed tracts, is incidental to a principle in respect to accretions, that the tract to which they first attach themselves, though only a thread runs from such tract at first, will take the additions, or so-called accretions, as far as they extend, and in whatever course, regardless of side lines of other shore owners. But, certainly, "lines and bounds," when they have to be thus determined, are very far from being certain; although in the opinion by Mr. Justice Phillips, from which the quoted words are taken, it was supposed that in letting each proprietor go "to the water's edge," one of them would "not come in between the lake and * * * (another) after the waters have receded beyond the center." (Record, 481.) Yet the decree in question is violative of the supposition indulged in the observations quoted.

Two patentees, Holbrook and Egan, entered tracts which were bounded by the lake. Their water frontage overlooked the lake, to and beyond the state line. But for a long distance from the water's edge, next to and in front of their tracts, the water had but little depth. In time, if not quite from the first, it was not deep enough either for fishing or for boating; and but little water remained, for quite a distance from the shore line; the part nearest such tracts shoaling into small ponds or

pools, or becoming muck. Then some of the space intervening between the more permanent water and the original western shore or water line of such tracts was by the decree called partly ridges and partly accretions; and the portion of these which the decree awarded to Mr. Shedd cut off from the remaining or more permanent waters the representatives of the Holbrook and Egan tracts.

The case is not supposititious. In the award to Mr. Shedd, as between himself and the plaintiffs in error, the appropriate side lines for extensions of the tracts are ignored or shortened by the decree.

Westward of the deeper and more permanent part of the lake was a narrow thread-like hump or ridge, more or less broken into parts, some of which were slightly higher in elevation than other parts of the bed, there being along the surface, between the more or less broken parts, three, perhaps four, small elevations, but little higher than the rest. These in the subsidence of the lake appeared above the water, and became islets or islands, and finally the decree supposes them to have become connected, and treats them as accretions to the two small tracts of Mr. Shedd, while the representatives of the Holbrook and Egan tracts are cut off from the remaining waters.

A suppositious case, but little more fruitful of wrong in its outcome, may be illustrated, by imagining a growth as an accretion (so styled by the decree), from one of Mr. Shedd's tracts, winding like a serpent in its course, and taking to itself the swallowing capacity of Aaron's rod, dominating the land surface exposing itself throughout the lake.

The supposed rule as to accretions is very uncertain in character when applied to such a lake as that now under consideration. It would necessitate not only partition, but re-partition from time to time, especially in the case of subdivision into small lots, and would frequently give rise to contests as to how the accretions grew, or where their first connection with the shore arose.

THE COMMON LAW RULES OF GIVING EACH SHORE OWNER A PROPORTION OF THE LAKE BED IS MUCH MORE REASONABLE AND PROPER IN APPLICATION.

The first step "would be to ascertain what were the water boundaries of the whole government subdivision," that is to say, of each government subdivision.

Jones v. *Lee*, 77 Mich., 35, 42.

> "Whatever water rights belong to any part of that subdivision must necessarily fall within those that belonged to the whole of it at the time when it was made ready for sale by the United States government, and no change, if any took place, in the shore line could enlarge that grant at the expense of any other. It is also beyond question that any owner of water rights within said subdivision could determine for himself in what way he would subdivide and parcel out his own property." (*Ib.*, 41.)

He would not be allowed "to cut off the water front of another owner while the water in front of such owner would be subsisting." (*Ib.*, 41-2.) The length of his shore line would be readily ascertained, and he would take a proportionate share of the water space adjacent to and fronting the same, including any knolls, islets or islands originally unsubmerged, but not sectionized; these passing to him from the government grant. Of course he would take any such unsubmerged elevation showing

its surface after such grant, within the defined space; side lines being extended from the established corners on the shore. He need not consider himself bound to inquire as to accretions, nor bound to consider whether a formation within the body of the water is a reliction. It is not a case of an island arising *de novo* in the King's seas, nor the King's arms thereof, of which mention is made in *Hale De Jure Maris*, c. 4; 8 *Bacon's Abridgement, Bouvier's Edition*, 19.

The decree is inconsistent in itself. It did not confine the defendant in error to an award of accretions on the principle that the tracts of defendant in error went but to the water's edge. It adopted in part the principle that the patent under which he claimed passed the islands, independently of the doctrine of accretions. (Record, 447, par. 67.) It was thus intended to cover the hypothesis that the common law rule prevailed as to islands not sectionized or surveyed. The inconsistency must be apparent; for the general theory on which the decree was framed was that the patentee took the land only to the water's edge, with an incidental riparian right to "follow the recession of waters to their edge" (Record, 481); the opinion of the Supreme Court of the state apparently excluding the right to reliction in such cases. (*Ib.*)

In the particular case a satisfactory adjustment has been made as to the South Bay, above named, when it alone is considered; but such adjustment remains to be made as to space north of the South Bay, such space extending from the west shore to the Indiana line. There are but two or three proprietors whose rights in respect to that space call for inquiry. The plaintiffs in error are substantially one, and the defendant in error is perhaps the only other per-

son having any claims necessary to be considered. The state should not be allowed to step in from a fancy that fish, if placed in any of the waters in Illinois, would thrive. When the original patentees have had to pay for the property thrice over, in the expense of contests and in taxes, good faith would require the state to stand aloof, confessing that, as the court finds the lake to be non-navigable, the state can show no title to it.

It is not reasonable to apply to such waters rules as to accretions or relictions which properly pertain only to navigable waters which are more permanent.

The definition of "Accretion," as given in 1 Am. & Eng. Enc. of Law, 2nd Ed., p. 467, would not characterize the process of enlargement of land surface in the case of tracts bounded by this lake. There would not be found to be "a deposit of earth, sand or sediment" on the land "by contiguous waters." There would, however, be found a growth of marsh or swamp grass; a marked evaporation of the water at intervals (Record, 195); a diminishing supply of water, as inflow from different directions would be cut off, in the deepening of the Calumet river and the general march of improvement; a general shallowing from one cause and another, including the growth of reeds, rushes and heavy grass (Record, 190); and from first to last a stillness and weakness that give the land rather than the water the chief supremacy, showing that in the uses to which the land can be put are the chief utilities to be expected.

The Supreme Court of Illinois, in *Braxon* v. *Bressler*, 64 Ill., 488, 489, said:

> "The common law is in force in this state, and its principles must control in the elucidation of the question" considered. And again, at p. 492, *ib.*,

> "The peace of society and the security of personal rights demand a legal recognition of the ownership of the beds of the streams within the state, as well as the water."

The policy of the state as thus declared has been determined in many cases, as applicable here, in all important elements, as in the case of a river; and such policy should not be considered as having been overthrown by the dictum adopted by the State court in this case.

A decree should be directed as heretofore indicated by this court, and in accordance with the judgment in *Hardin* v. *Jordan*.

Respectfully submitted.

THOMAS DENT,
for Plaintiffs in Error.

NOTE.—The opinion of Mr. Justice Phillips, printed in the appendix to the record in this case, pp. 461-482, from 161 Ill., 462-497, contains *errata*, here specified in part, namely:

Report, 463; Record, 462, "south-east" should read "south-west."

Report, 462; Record, 464, lands claimed by Gertrude H. Hardin, should be as described, *ante*, or in patent to John Holbrook. (Record, 245.)

Report, 463; Record, 462, "several thousand acres" is error. Part in Illinois contained 1,283.12 acres, as per certificate of Commissioner of General Land Office on the margin of the plat showing the survey of 1874.

Report, 466; Record, 465, plat shown is not a correct copy of the plat of the survey of 1834-5, nor of the survey of 1874. It does not give correctly the marginal line of the lake. For example, it makes much more of south-east fractional quarter of Section 20 than does the government plat. It extends that tract too far south and too far east. The original plat shows the lines as intersecting the state line at 22.69 chains south of the east and west center line of Section 20, or about half the distance shown on the plat given in the opinion. Also the township was fractional, and the east tier of sections were not of full size, by reason of the state line intervening. The sections shown next west of the state line are represented in the plat in the report as having full width, or more, east and west; and the same remark is to be made of the plat in the report, p. 465 (Record, 463); whereas the original plat shows that the east half of these sections had less than half the full width or area.

Both diagrams in the report, pp. 465-6, Record, 463,

464, show an outlet of the lake connecting it with the Calumet River, but very much enlarged over that shown on the government plat. (See map No. 1, *ante.*)

The second plat, entitled Diagram No. 2, shown in the opinion, p. 466; Record, 464, is the same as the former plat in the opinion, except that it purports to show the subdivision of the lake under the survey of 1874, but is incorrect in this respect, as also in other respects as above.

Report, 473; Record, 468, the west fraction of the southeast quarter of section 30, entered by William B. Egan, was not claimed by Gertrude H. Hardin as a whole. She only claimed such part as lay east of a line eighty rods east of and parallel with the north and south center line of section 30.

It is deemed unnecessary to specify other matters. These have been pointed out in order to draw attention more especially to the record, in different particulars.

In compliance with a Stipulation, a copy of the Opinions of His Honor Judge Tuley will be given below as Appendices.—An opinion by Judge Seaman is also so given as per stipulation.

APPENDICES.

Appendix No. 1.

Oral Opinion of Judge Tuley in Shedd v. Thomas, 442 and 443 Burnt Record, Cook Circuit Court, August 3, 1892.

Judge Tuley:

In these two burnt record cases, 442 and 443, commonly called the Shedd-Hardin cases, I have drafted an opinion, which I will hand down to the clerk, in which I have attempted to dispose of the principal questions made by the record, both of law and fact.

There are some questions not referred to in the opinion which were disposed of as the case progressed, particularly the question of jurisdiction.

I will adhere to the opinion expressed then, that the mere fact or allegation that the records of Cook County were destroyed by a fire, gives the court jurisdiction without reference to the question whether any part of the records pertaining to the title of the complainant were destroyed or not. I think a party has a right upon the allegation of destruction of records to come into court under that act (the Burnt Record Act), to establish his title, if only for the purpose of showing that there was nothing affecting his title which was destroyed by fire.

As to the principal contest, which is the contest between the two patent titles, one under the survey of 1835 and the other under the survey of 1874, I have felt compelled to follow the decision of the United States Supreme Court in the case of *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, being of opinion that the best authority as to the grant by the United States, and the effect of such grant is the United States Supreme Court itself.

It is true that that decision was rendered in an ejectment case in which there has since been a new trial granted in the lower court, but I recognize it as a binding authority and as a final authority upon the law point decided as if it had been given upon a second trial, the last trial in ejectment.

In the 137th United States, *Packer* v. *Bird,* the court well recognizing its former decision to the effect that the decision of the State Court as to the authority of the state over the waters within the state and relations of the state to the shore would be followed as it is there stated, that they will only be followed so far as they do not interfere with the grants made by the United States or the beneficial use of those grants. But it is sufficient now to say that I have recognized those two cases of *Hardin* v. *Jordan* and *Mitchell* v. *Smale,* made concerning these same patents under the survey of 1835 and the patents under the survey of 1874, and concerning these same lands or a portion of the same land which is now in controversy, as of binding force in deciding this case upon me, and in accordance with those decisions I have held that under the survey of 1835 the patents issued to Douglas, Holbrook, DeWitt (Egan), conveyed all the title that the United States had both in the land abutting upon the lake and in the bed of the lake to the center thereof, and that nothing after the issue of those patents remained in the United States to grant and, therefore, nothing passed by the patents issued upon the survey of 1874.

As to the contention of actual residence for seven years under a title deducible of record from the United States or some officer authorized to sell land for taxes, as provided in the act of 1835, I have endeavored, in the opinion, to give the reasons why I have found that, as to each and every one of the parties making that claim of actual residence, there is a failure of proof as to some portion of time included in the seven years, and that in no one case have the parties been able to make out seven years actual residence from the time of the issuing of the patents under the survey of 1874.

I have held as to the certificate conferring an equitable title—it evidently conferred no legal title—that there can

be no equitable title in land. There may be an equity, but there can be no such thing as an equitable title in land, without the party stands in the position whereby he is ready to demand the legal title, and the certificate did not give these parties a right to demand the legal title of the government of the United States, because the legal title of the government of the United States had been conferred under patents issued under survey of 1835. That it would be like holding because A paid B money for land belonging to C that that gave A an equitable title to the land.

As to the tax titles I have endeavored to review each of them. I have found them, without exception, to be bad, and I have also held that while they may act as a color of title, no invalid tax title could form the basis for a seven years' actual residence under the statute of 1835.

As to the titles of the complainants Shedd and Hardin, without reviewing again the authorities, I have found that they have a good title under the survey of 1835.

As to the double description of the land conveyed in the same deed affecting the Hardin title, I have held that the parties to those conveyances, and who were interested in the land, have acquiesced in the construction which was given by the grantees as to the land conveyed and that an outsider can raise no question whatever, but it operated practically, or would operate as a division or a partition between the parties owning the land.

There, then, remains the question only as to the interests of Shedd and Hardin in the land uncovered by the recession of the waters of the lake and in and to the bed of this lake. I think the opinion will be found sufficiently definite to convey the idea of the court as to the partition or rights of the parties in that regard. It is sufficient to say generally that I have followed the opinion of the United States Supreme Court in the Hardin case in making the division as to the bays, and I think that the tongue of land running down from the southwest quarter of section twenty, in fact, according to the evidence, made a bay to the west of that tongue of land between that and the Hardin property.

I have found from the evidence, although the evidence is not clear and positive as to the amount of land which was contained in the two tongues of land (that in the south-west quarter of section twenty, and that known as fractional section twenty-nine), yet from the evidence I have found that the north tongue of land did run substantially down to the south line of the south-west quarter of twenty, and I have treated the land between that south line of the south-west quarter of twenty and running the line down to the Hardin land upon the west as a bay, and, as in the Hardin case in the United States court, dividing the bay between the opposite shore corners, I have decreed that that bay be divided between the opposite shore owners, Hardin taking towards the east and Shedd taking towards the west to the center of the bed of the lake, the meander line, so far as it is run, forming the basis for the commencement of the division between the parties, or for running the division between the parties.

In regard to the point of land at the south end, known as fractional section twenty-nine, there was also much more land than was shown upon the recorded survey of 1835. I have in regard to that, as in regard to the south-west quarter of section twenty, indulged the presumption, or looked upon the evidence in the most favorable light, it may be said, as to the quantity of land which was embraced in those two tongues of land running up into the lake, most favorable to the owners of the patent title under the survey of 1835, and I have thought from the evidence, that it would be equitable and fair to consider that tongue of land as running up to the north line of the south-west quarter of twenty-nine, and treating that portion of the bed of the lake between that tongue of land and the Hardin property upon the west side of the lake as a bay, have divided that bay or the land which has been left by the recession of the waters, or may be left by the recession of the waters between Shedd and Hardin, the owners of the tongue of land on the east and Hardin the owner of the land upon the west. So, practically, that bay runs up north under this division to the north line of the south-west quarter of twenty-nine.

That leaves undisposed of the land between the south line of the south-west of twenty and the north line of the south-west quarter of twenty-nine; all of that frontage beween those two points upon the lake (Hyde lake), and what was originally known as "Navigable lake," lies in front of Hardin's property.

Hardin will take under this decree all land in front of his property between the south line of the south-west of section twenty and the north line of the south-west quarter of section twenty-nine to the center of the lake.

I have not attempted to fix the center of the lake by decree further than to declare that the lake ought to be divided with the line drawn north and south. In other words, that the two points of the lake furthest distant one from the other, lying upon the north and south ends of this lake, north and south sides of this lake, and I have declared that the center line of the lake went to, east of what is called the state line, such line between the State of Indiana and the State of Illinois, dividing the lake into two parts, I have declared that the court will go no further than the state line in making a division between these parties as to the land which has been or may be uncovered by recession of the waters, and as to the rights of the parties in the bed of the lake covered by the waters.

These rights, however, are especially declared to be subject to the rights of riparian ownership which are, of access to the water, of usage of the water for cattle and so forth, for domestic purposes, and also, as to what I have termed a common right, founding my decision largely upon the English cases of the House of Lords in regard to the Scottish lakes, that there is a common right in all other owners upon these non-navigable lakes of boating, fishing, hunting, and any other right to which a party may put the use of water which is common to all, the other owners of such lake, and thus the rights of Hardin and Shedd will be declared subject to these common rights specified in the opinion.

* * * * *

Appendix No. 2.

Opinion by Judge Tuley, Filed August 3, 1892.

Charles B. Shedd
vs.
Elizabeth P. Thomas *et al.*
} B. R. 442. *Circuit Court of Cook County.*

Same
vs.
J. Ensign Fuller *et al.*
} B. R. 443.

Tuley, J.:

There are in these cases two apparently opposing patent titles. The complainant in original petition, Shedd, and the cross-complainant, Hardin, claim under patents issued under the United States survey of 1834-5, by which they allege their lands were bounded by Wolf Lake, a meander line having been run in that survey in order to ascertain the quantity of upland in the fractional sections and subdivision of sections abutting on the lake. The other parties to this suit claim under patents issued upon survey made by order of officers of the United States land department in 1874, whereby a part of the bed of Wolf Lake was surveyed as United States government land, the quarter section lines of the survey of 1835 being extended across from the meandered line, whereby the entire bed of the lake from the shore line to the state line between Indiana and Illinois was surveyed. The state line ran through Wolf Lake near the middle thereof.

In 1882, and prior to the commencement of these consolidated cases, certain ejectment suits were commenced by the holders of the patent title under the survey of 1835 against certain persons in possession of the bed of the lake under patents issued on the survey of 1874. These suits were consolidated in the United States Circuit Court for this district into two cases, *Mitchell* v. *Smale* (Mitchell representing the Shedd interest), and *Hardin* v. *Jordan*.

The cases were tried and went to the Supreme Court of the United States, where they were decided in 1890, reversing the judgments of the lower court. Judgments were entered in the United States Circuit Court in pursuance of the United States Supreme Court decision, but a later decision of that court held that the defeated party was entitled to a new second trial, and both said cases now stand for new trial in the United States Circuit Court.

It is clear that the main question presented to the United States Supreme Court was, which was the superior title to the bed of the lake, claimed to have become largely dry land by a recession of the waters of the lake, the title of those claiming under the survey of 1835, or the title of those claiming under the survey of 1874.

That court held those claiming under the survey of 1835 to have the better title, and that the survey of 1874 was without the authority of law, and that all the acts of the land department in reference to the survey of 1874, including the issuing of patents, were void and of no legal effect. The United States Supreme Court, in the opinions in the two cases, enunciated important principles of law, applicable to lands bounded on non-navigable waters. There was a divided bench, showing thereby mature deliberation of the court. The law thus laid down was not only for the government of the cases then before the court, but was also for all future cases involving like questions.

The court held, *inter alia*, that grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed as to their legal effect according to the law of the state in which they lie.

That at the time of the grant by the United States of the lands bounded on the lake, under the survey of 1835, the common law of England, as it existed prior to the fourth year of James the First (1606), had been, by express statute passed as far back as 1819, declared to be the law of this state, and must govern as to the legal effect of the grants by the patents, issued under the survey of 1835.

That by such common law, under a grant of lands bounded on a lake or pond which is not tide water and is not navigable, the grantee takes to the center of the lake or pond ratably with other riparian proprietors, if there be such, and that this rule prevailed in Illinois when the patent to Hardin's ancestor was granted in 1841, and is still the law of this state, notwithstanding the decision of our Supreme Court of Illinois in *Trustees of Schools* v. *Schroll*, which appears to hold an opposing doctrine, *i. e.*, that under a grant of lands bounded by a lake the shore proprietor did not take to the center of the lake, but only to low water mark.

In the ejectment suit of *Hardin* v. *Jordan*, it was contended, as here, that, it appearing by the field notes that the lake had been meandered in the survey of 1835, although such meander line did not appear upon the plat prepared from such field notes, that such meander line was a line of boundary for the shore proprietors. But the United States Supreme Court held, that "It has been the practice of the government from its origin in disposing of public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream or other body of water," and that such meander lines "are run for the purpose of ascertaining the exact quantity of upland land to be charged, and not for the purpose of limiting the title of the grantee, to such meander lines," citing cases from Wisconsin, Michigan, Indiana, Iowa and United States Reports, and from our own state—the cases of

Middleton v. *Pritchard*, 3 Scam., 510.
Canal Trustees v. *Haven*, 5 Gilman, 548, 558.
Houck v. *Yates*, 82 Illinois, 179.
Fuller v. *Dauphin*, 124 Ills., 542.

In the face of the Illinois decisions that a meander line is not a line of boundary, and that of the United States Supreme Court as to the bed of the lake here in question, that this particular meander line is not a line of boundary, there is no room for the contention that it is a line of boundary.

The United States Supreme Court in the Jordan case, in construing the effect of the grant of the land abutting on the lake, "according to the official plat of the survey" of 1835, also held that in 1874, when the water had receded, leaving a portion of the bed of the lake uncovered, the United States did not, but the shore proprietors did own, not only such uncovered land, but the bed of the lake to the center or middle thereof. That therefore the United States owned no land on or in this lake to be surveyed in 1874, and consequently that all the acts of the Land Department in making the survey, and in issuing the patents under such survey for the bed of the lake inside of the meander line, were null and void.

That such Land Department had no jurisdiction of the subject-matter or of the persons, and its adverse decision, as to the claim of the shore owners as to the bed of the lake, was of no effect, for the same reason.

Hardin v. *Jordan et al.*, 140 U. S. R., p. 371.
Mitchell v. *Smale*, 140 U. S. R., p. 406.

I am of the opinion that the highest and best authority, in construing a patent of the United States, and as to its legal effect, is the Supreme Court of the United States.

Lender v. *Kidder*, 23 Illinois, 49.
Packer v. *Bird*, 137 U. S., 669.

It is said, however, that in *Hardin* v. *Jordan* and the other ejectment suit of *Mitchell* v. *Smale*, a new trial has been granted. That the effect is a new trial, both as to the law and the facts. I apprehend that this fact does not do away with the law as laid down by the Supreme Court; that a meander line is not a line of boundary; that the grants to the shore owners under the survey of 1835 conveyed all interest the United States had in the upland abutting on the lake and in the bed of the lake itself, and that the survey of 1874 and all proceedings and patents thereunder were null and of no effect, and that, at the date of issuing the patents under survey of 1835, the common law of England, as it existed prior to the fourth year of James I, governed and determined the rights of the shore proprietors.

It is contended by those claiming under the survey of 1874 that this court should follow the decision of the Supreme Court of Illinois in *Trustees of Schools* v. *Schroll*, 120 Illinois Reports, which appears to hold that where land is conveyed bounded upon a non-navigable lake, the grant extends only to the water's edge. The United States Supreme Court, in *Hardin* v. *Jordan*, comments at length on this case and refused to recognize it as the law of Illinois controlling the rights of shore owners on Wolf Lake under the patents based on the survey of 1835, and hold in effect that the language of the Illinois court in that case upon that point was *obiter dicta*. It appears to me that the decision of the United States Supreme Court in *Hardin* v. *Jordan* must control this case, as the rights of the owners of the shore lands under the survey of 1835 became fixed and determined under the law of Illinois, as declared by the Illinois Supreme Court in several decisions prior to that of the *Trustees* v. *Schroll*, 120 Illinois, and could not be changed by this later decision.

But it is argued that a different case is made here to that made in the ejectment cases.

The questions as to the nature of the grants by the United States, under the survey of 1835, and as to what passed thereby must necessarily always be the same.

That there was a strip of land, in what was marked on the plat of the survey as part of the bed of the lake, running out from the meander line of fractional southwest one-fourth of 20, and from what was called fractional section 29, as clearly appeared in that case, as in the one at bar.

The special finding of Judge Gresham in No. 4 of such findings, as to the condition of the strip of land in question, and as to how far there were in fact two lakes and not one, I regard as substantially correct (as shown by the evidence in this case), *i. e.*, as to condition of said ridge of land at the time he rendered his decision. Also that such was substantially the condition of said ridge of land (as to waters of said Wolf Lake) for many years prior to 1874, and up to the time when the artificial cut was made from Hyde Lake to the Calumet for the purposes of the Chicago and Southern Railroad.

Since the cutting of that new outlet from Hyde Lake to the Calumet River, the waters of Wolf and Hyde Lake have receded so as to leave more uncovered land of the bed of the lakes than there was at the time of the survey of 1874. The condition of the ridge and the amount of land uncovered (which by the plat of survey of 1835 was marked "navigable lake"), at any time subsequent to the survey of 1874, is of little or no relevancy in this case.

The only vital question in that regard is, what was the condition as to land and water at the time of the survey of 1834-5, and as the claimants under the survey of 1874 attack the survey of 1834-5, the burden of proof is upon them to show unsurveyed or omitted land.

The presumption is that the survey was made in good faith and that the United States officials acted honestly and faithfully in regard thereto. This presumption of law is not easily overthrown after the lapse of fifty years.

If there was evidence in the ejectment case clearly showing the condition of these lakes, Hyde and Wolf, as to land and water at the time of the survey of 1835, it has not been produced in this case.

The evidence tends to show that the survey of 1835 was made at a time of high water, and when the water was two feet or more above the ordinary level of Lake Michigan, but for how many years before or after the water of Wolf Lake was or was not at the same stage, at the same time of the year, as it was when the survey of 1835 was made the evidence fails to show.

That there was some land not covered with water inside the meander line (particularly in southwest one-fourth of section 20 and section 29) at the time of the survey of 1835 there is no doubt, but it is impossible from the evidence to ascertain the exact quantity of such land. The evidence fails to show that there was such an excess in quantity, over what the plat exhibits, as to show either fraud or mistake of the surveyor.

If there was any land between the meandered line and the center of the lake, the shore proprietors (the lake being the boundary) would be the owners thereof under

the common law, and the decisions of our own Supreme Court, cited and commented on by the Supreme Court of the United States in *Hardin* v. *Jordan, Mitchell* v. *Smale, supra.*

(See the authorities cited in *Hardin* v. *Jordan.*)

Independent of the question whether the proof as to omitted lands, omitted by mistake or fraud of the surveyor, can be raised under the pleadings, the holders of the 1874 survey title are in no position to question the survey of 1835. The survey of 1874 was not made on any such theory of mistake or fraud. The survey of 1874 was based on the correctness of the survey of 1835 and on the theory that the meander line was a line of boundary, and that land represented as in the bed of the lake had become by the recession of the waters dry land, susceptible of cultivation, and that the United States owned the same.

The survey of 1874 cannot be sustained on any theory of omitted lands, as contended for by the Jordan interest. From the authorities, the United States is the only party that could challenge the survey of 1835 for fraud or mistake, and the United States could not, if it had parted with all its interest in the shore lands and the bed of the lake, nor could it do so as against *bona fide* purchasers of the land without notice.

I therefore hold that the claimants, under the survey of 1874 and patents thereon, acquired no title or interest by virtue of such patents.

Without entering into a review of the claims of title under the patents issued to Holbrook, Douglas and De Witt, it is sufficient to say that there is no question but that Shedd, the complainant, is seized in fee simple of the fractional southwest one-fourth of section 20 and fractional section 29 by title deraigned from the Douglas and De Witt patents.

As to the Hardin title, which comes under the Holbrook patent, I find no difficulty in coming to the conclusion that she also is seized in fee simple of the several tracts claimed in her cross-petition. I regard the apparent contradiction in some of the deeds, granting the

"undivided half" and the south half of the tract in the same deed, as of no importance in this case. The parties in interest treated the deeds, as between themselves, as conveying the south half, and, as to all third parties, the conveyances and acquiescence therein by the parties should be treated as a partition between the parties in interest.

The defense is made of the Statute of Limitations of 1835, which provides for a title derived by

> "possession by actual residence thereon for seven successive years having a connected title in law or equity deducible of record from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land for the non-payment of taxes * * * but when the possessor shall acquire such title after taking such possession the limitation shall be good to run from the time of acquiring such title."

It is evident from the statute that the possession and title must concur.

The certificates were issued under survey of 1874, on June 14, 1881, the patents July 2, 1881. These suits of Shedd were commenced in 1888, June 29th and 30th. If actual residence is made out by the proofs, it is for full seven years between the date of the certificate of payment of the money to the United States receiver and the commencement of these consolidated suits, but it is for less than seven years if we commence counting residence from the date of the issuing of the patents.

The legal title remained in the United States until the patent issued. It did not pass by the receiver's certificate. Did the certificate confer an equitable title? Where one, being the real beneficial owner of the land, has a right to demand the legal title, he owns what is termed an equitable title. The difficulty about the equitable title here is that the actual legal title was in grantees under the survey of 1835, and there was no right in the holders of the certificate of payment to the United States to demand such legal title. There was in the United States no legal title to be demanded. To hold this to be

an equitable title would be equivalent to holding that A, by paying money to B, for land owned by C, had an equitable right to demand a conveyance from C.

It is contended, however, that Hardin's cross-petition was filed more than seven years after the patents issued, and, therefore, there was actual residence for seven years before the commencement of her suit.

Hardin was made defendant to Shedd's petitions filed June 29th and 30th, and I am inclined to the opinion that the court acquired, by filing the petition, jurisdiction over the *res* (the land) in controversy, and that in analogy to the rule governing suits in partition, all parties to the suit are actors, and that the filing of the bill stopped the running of any limitation statute as to all parties thereto, whether complainants or defendants.

But if that position is not tenable, the question arises, can the patents issued for land the United States did not own, by officials of the United States without authority or jurisdiction to issue the patents, be a foundation for seven years' actual residence under the statute as a title deducible of record from the United States?

If a sheriff should issue a deed purporting to be a tax deed when no tax had ever been levied, nor sale had, or if state officers should issue a deed to land which the state did not own and never did own, or to land which the state had conveyed forty years previously, could it be pretended that such deeds would form a basis for a title under the statute? I think not.

Moore v. *Brown*, 11 Howard, U. S., 416.

If these parties are chargeable with notice of the records of the Land Office as to the prior sale of the land, and that the United States had no land to patent, as I think they were, could they by obtaining a patent make it a basis for the running of the statute? It certainly would be against conscience to permit such a deed to be made a foundation upon which to deprive the real owner of his property.

If these patentees are chargeable as a matter of law or fact with knowledge of the applications and affidavits

upon which the survey of 1874 was ordered, can they advantage from patents issued thereon? Some of them must have had actual knowledge, and all who received patents must, in my opinion, be charged with constructive knowledge of the contents of the affidavits so filed; and, if they knew, as they must have known by actual residence upon the ground, that the said affidavits were untrue in more than one material matter, I am of the opinion that a court of equity must hold that a patent so obtained cannot by the original patentee be the basis for a title "deducible of record," and for the running of the statute.

This is not like the cases where it has been held that title under a patent fraudulently obtained cannot be attacked collaterally, or set aside as against *bona fide* purchasers without notice. In such cases it has been held the legal title passed from the United States, notwithstanding the fraud, but here the United States had no legal title to pass. Here the question is whether an apparent legal title obtained by a constructive or an actual fraud can be set up by the original grantee as a basis for the running of the statute. I think not.

If any of the defendants, not the original patentees or mixed up with the survey of 1874, bought in good faith and occupied after their purchase by seven years' actual residence, prior to being brought into court in this suit, it may be that such residence might avail them under the statute, but those who assisted in the survey of 1874, a survey of "land alleged to be fit for cultivation" made, accompanied by a boat, the chain bearer in water up to his chin, pegs three to six feet long used to fix corners, or those who were parties to the applications for the making of such survey, or those who are chargeable with actual notice of the falsity of affidavits upon which the survey was ordered, cannot have any standing in a court of equity to claim that the court should by its decree enable them to profit from such acts.

It is, however, not necessary to hold that the patent under the survey of 1874 cannot be made the basis or source of title under the limitation act of 1835.

Was there, as to any of the tracts in question that continuous, actual, visible, open and exclusive possession and residence; that union of title and actual residence required to constitute a defense or a title by limitation?

AS TO THE ALICE CONDIT TRACT. THE FRACTIONAL SOUTHWEST QUARTER OF SECTION 20.

The evidence shows a period of several months between the spring of 1881 and May, 1882, that Mrs. Alice Condit was absent in Indiana, and did not, therefore, actually reside upon the property. If it could reasonably be contended that Smale was her agent, and held possession for her, it does not appear that he was in possession for Ord, after she sold to Ord in July, 1881, nor is the evidence satisfactory that any one was in possession for several months between the dates stated.

A house kept locked up for months cannot be said to be the actual residence of any one. The moment it is abandoned as a residence and ceases to be actually resided in, the constructive possession of the actual owner attaches and the running of the statute is suspended. It is also suspended when there ceases for one moment to be an union of actual residence and title. There is an apparent interregnum of the union of residence and title between the date of the assignment of the Smale lease to Jordan and Jordan's acquisition of title.

I have no doubt from the evidence that Mitchell found the premises, both the Alice Condit and Ellis Bennett houses, vacant, and that actual possession was taken by Newsome under Mitchell's verbal lease to him.

AS TO THE FOUR AND ONE-HALF ACRES, SOUTHWEST ONE-FOURTH OF SECTION 20.

The title deducible of record is the tax deed, S. Park Commissioners to Bennett. This deed is void on its face. It purports to be a deed for a sale made subsequent to date of deed. It could confer no title. It could not be corrected by the officer making a new deed. His power was exhausted when he made the first deed. The mistake could only be corrected in a court of equity. It is also void for reasons hereafter stated.

AS TO THE FIELD RESIDENCE. FRACTIONAL SECTION 29.

As to actual residence on this tract. The evidence fails to show any such occupation for some months after Barnes left in 1882 or 1883. Also for some months after Fogli left in 1885 and before Chandler moved in.

AS TO THE REESE PLACE.

The evidence of the occupation from 1878 to 1881 is not of that satisfactory character to found adverse possession upon. There was a residence occupied by Reese south of near the south line of fractional section 29. On this section line he had a fence and one or two old barns or sheds on the fractional section 29 north of the fence. There was no inclosure of where the barns stood. The title was in Forsythe for part of the time, and Reese stacked Forsythe's hay on Forsythe's land. It is doubtful from the evidence, to say the least, whether his possession was adverse to Forsythe.

The evidence of the alleged purchase of the seven and one-half acre tract by Forsythe for Reese is indefinite, unsatisfactory and insufficient. The evidence tends to show a verbal express trust, obnoxious to the statute of frauds, rather than a resulting trust.

THE SOUTHEAST ONE-FOURTH OF 19. FARRAND PLACE.

The evidence shows lease to Rosenquist from Jordan, March, 1882, when Jordan had no title until October, 1882. There was then no union of residence and title. Rushmore's possession was a divided possession not exclusive. Conyvesey was in possession for Hardin, and cut hay two or more years on part claimed by Rushmore.

Rosenquist also within the alleged term of seven years was advised by the agent of Jordan, Bennett, that he must make terms with Hardin as to his further occupation, and he did so. This interrupted the running of the statute.

I find that the evidence tends to show a break in the actual residence about November, 1887, after the death of Chickey. There was certainly quite an interval of time between the time the Chickey family vacated, and the house they occupied was torn down, and the new house was built.

THE RAND TRACT.

What has been said as to Conyvesey's divided possession with Rushmore affects also this claim of adverse possession. Nor is there any doubt but that Killam Smith took lease from Hardin, and was in as Hardin's tenant.

As to the railroad and the McDaid and Thomas and other defendants, there is no claim of adverse possession by actual residence thereon, but they all claim through the patent title of the survey of 1874 or through tax titles or both.

I have disposed of the claims based upon the survey of 1874.

AS TO THE TAX TITLES.

It is unnecessary to take them in detail. It is sufficient to say that I am clearly of the opinion that there is not one of them that is valid.

I understood our Supreme Court in *Elston* v. *Kennicott,* 46 Illinois, overruling *Irvine* v. *Brownell,* 11th Illinois, has held that an invalid tax deed, although it may be sufficient as to color of title, cannot be made the basis of title under the Limitation Statute of 1835, concerning titles deducible from an officer authorized to sell land for taxes. See also *Moore* v. *Brown,* 52 U. S., 114.

The objection, as to the excess of costs included in the judgments in all cases in which sales were made prior to 1880, is well taken. (*Coombs* v. *Coffe,* 127 Illinois, 431.)

This objection applies to six out of the eight tax sales relied on in opposition to Shedd's title, and which were

argued by Mr. Mecartney. Certain of the sales are also subject to the objection of excessive interest being included as pointed out by Mr. Mecartney. The sale of September, 1880, for eighth installment South Park tax is invalid, because the affidavits filed fail to show the diligent inquiry required by the statute, as to the assessor and as to the owners. The sales of 1884 for 1883 taxes to Reed is subject to the fatal objection, among others, of a want of process.

Ogden v. *Barnes,* 125 Ills.

The affidavits which allege service of notice by leaving it with some other persons are insufficient. The publication notices which fail to give the specific date of the expiration of the time of redemption and those "to whom it may concern" are insufficient. I do not know if counsel deem it necessary to specify the specific grounds of invalidity of these tax deeds, if they do, and those named in this opinion are deemed by them insufficient, they may present others to be passed on before the decree is settled. The objections above noted, some of them apply to the following deeds, as well as the objections hereafter specifically named:

The tax sale, northeast one-fourth of section 30, dated August 1, 1879, reciting sale of November 9, 1879, was void on its face. The clerk had no right to issue a new deed, first, because his power was exhausted in issuing the first deed. If there was a mistake, the correction could only be made in a court of chancery. Second, because the second deed was not issued within two years alter the sale. The description is also so indefinite as to make the deed void.

AS TO THE FOUR TAX DEEDS SET UP BY FULLER.

The tax deed to Hamilton September 6, 1875, under sale of April 6, 1873, of west one-half, northwest, southeast of 19. No judgment or precept was offered, and it was sold again within two years.

The deed to Hamilton March 5, 1877, of undivided twenty acres in southeast one-fourth of southeast one-fourth of section 19, is a void description. The published notice was also insufficient.

The tax deed to Hamilton May 31, 1877. No judgment or precept was offered to sustain it.

The tax deed July 23, 1880, to Hamilton of northeast, southeast 19 is defective. The notice in application for deed describes the land as in section 9 in place of 19.

The tax deed sale of September 20, 1883, to W. K. Reed is void. There is no sufficient description of the property. It appears that Hardin redeemed from one sale of fractional southeast one-fourth of 19, which covered all of the land in that fraction.

The Crawford tax deeds as to northwest one-fourth of 29. There is no allegation or answer to support the tax deeds offered in evidence.

AS TO THE REFUNDING OF THE TAXES AND COSTS PAID.

The complainant, Shedd, and the cross-complainant, Hardin, seek to remove those various tax deeds as clouds. As a condition of doing so, they must pay the money paid under the sale with interest at six per cent., together with other costs paid by the holder of the tax certificate. As proven in this case, where there is no proof, there can be a reference to a master to ascertain and report amounts paid. If there is any doubt or contest as to when the said amounts are to be paid, that question may be reserved and the amounts decreed to be paid into court to abide decision as to who may be entitled thereto. I am of the opinion these taxes, etc., should be refunded upon the ground that the state had the right to tax this land which the water has uncovered, and might adopt any description which would identify the land taxed, even the invalid survey of 1874.

The question next presented is, what are the rights of the holders of the first patent title in the land uncovered by the recession of the waters, and what are their rights in the bed of the lake covered by water.

The contention of the complainant Shedd is that the patentees take to low-water mark, and that if the court holds that patentee takes the bed of the lake, such bed should be divided by section and quarter-section lines, giving to the shore owner the full section or quarter-section called for by the patent under which he claims.

AS TO THE HARDIN CONTENTION.

It is, as I understand it, that the shore owner patentee takes to the center of the lake, extending the section lines at right angles without regard to the number of acres so covered.

The highest court in the land, the United States Supreme Court, in the two cases, *Hardin* v. *Jordan* and *Mitchell* v. *Smale, supra,* has declared the law in regard to the rights of parties claiming under the first patents issued, as to a portion of the lands in question in this proceeding.

In *Hardin* v. *Jordan* that court held that the law of Illinois, as it was at the time the patents issued under the survey of 1835, determined and fixed the rights of the patentees.

That the common law of England, prior to the fourth year of James I, was then and is still in force in this state.

That under the decisions of this state, and of the United States, the meander line was not a line of boundary; that as the patents identified and referred to the official plat of the survey of 1835 and as that plat marked the lake as the boundary, the lake, and not the meander line, was the boundary line.

> "That a lake, or pond, like a river, is a concrete object, a unit, and when named as a boundary, the natural inference is that the middle line of it is intended, that is, the line equi-distant from the land on either side."

The court held the law, as laid down by the Supreme Court of Illinois in *Beckman* v. *Kreamer,* 43 Ills., 447, as to the riparian rights of shore owners on rivers, to wit, that the shore owners took to the thread or middle of the stream, was the law of this state, as applied to the rights of shore owners on non-navigable lakes.

The official plat of the lake in question was before the United States Supreme Court, and this map or plat showed Wolf Lake to be almost round, and also that cer-

tain shore owners on bays could not reach the center of the lake by any direct extension of the side lines of their property.

Did the United States Supreme Court, in the *Hardin* v. *Jordan* case, decide what was the common law as to the rights of these shore owners in the bed of the lake? If it did, I am unable to perceive why it is not the law of this case upon that question. If any rule was laid down in that case for a division of such bed of the lake or of the land uncovered by the recession of the water, it must be held to be the law applicable in the case at bar.

In the Jordan case, the lower court had given judgment for Hardin to the land to low-water mark, but in favor of Jordan to the balance of the southeast one-fourth of section 19, and of northeast one-fourth of 30, being inside of the low-water line.

The United Supreme Court, in its opinion, holds:

> "On the whole our conclusion is that the court below ought to have given judgment for the plaintiff Hardin as against the defendant Jordan to the center of Wolf Lake, instead of to low-water mark in front of the southeast fractional one-fourth of section 19, and of the northeast fractional one-fourth of section 30, and to the middle of the bay or projection of said lake of the east part of the southeast fractional one-fourth of said section 30."

Substantially the same judgment was directed to be entered in the case of *Mitchell* v. *Smale*. What the court means by the center of the lake does not clearly appear, whether, as the lake is round or nearly so, the center is a point equidistant from all points of the circumference, so that the lines of shore owners running to that point would resemble the spokes of a wheel, whether by the "center" was meant the thread or middle of the lake, drawing a line thrugh the middle, from its two points farthest distant from each other, dividing it as near as may, as if it was a river. The two points farthest distant from each other would be the north and south ends of the lake.

The court evidently perceived the difficulty of extending the side lines of the shore owner to the center, if it was a circular or nearly circular lake, because the opinion says:

> "If any question should arise between the plaintiff and any other riparian owner of lands situated on the margin of the lake as to the convergence of the side lines of the plaintiff's lands in the lake, it can be disposed of by the parties themselves by a resort to a court of equity, or to such other form of procedure as may be proper,"

also

> "that where a lake is very long in comparison to its width, the method applied to rivers and streams would probably be the most suitable for adjusting riparian rights in the lake bottom along its sides and the use of converging lines would only be required at its two ends. But whatever mode of determining the outgoing lines, as between adjoining owners, should be adopted in special cases which may be left for determination when they arise. There can be no difficulty in the present case as between the plaintiff and defendant."

The court reviews the decisions of different courts as to the rights of the shore owners in the bed of a non-navigable lake, and comment at length upon the decisions which hold that the riparian owner of a fractional lot bounded by a non-navigable lake takes so much of the lake bottom as is required to fill out the section or quarter-section of which he owns the fraction. The decisions commented upon are two of the leading decisions relied on by Shedd, *Clute* v. *Fisher*, 65 Michigan, 48, which was followed by *Stoner* v. *Rice*, 121 Ind., 51, and also upon the decision of Judge Gresham in the *State of Indiana* v. *Milk*, 11 Bissell, 197, wherein he holds that the rule applicable to rivers could not well be applied to lakes where there was no thread or current and more or less circular in form.

The United States Court holds that the arguments, *ab inconvenienti*, is not sufficient to justify an abandon-

ment of the common law rules which have been adopted in Illinois, and that the Michigan and Indiana

> "method of disposing of the subject might be convenient and attended with some advantages if it were sanctioned by law, but that there is not greater reason for adopting such a departure from the common law than that followed in *State of Indiana* v. *Milk.*"

The Michigan and Indiana rule commends itself, to my judgment, for the reason that, in a large number of cases, it has been held that the patentee took all the lands in the fractional section, without regard to the number of acres specified in the patent, and large quantities of land beyond the number of acres specified in the grant, even islands of large size have been held to pass by the patent of the shore land.

Among the cases so holding are

Houck v. *Yates,* 82 Ills., 179.
Forsyth v. *Smale,* 7 Biss., 201.
St. Clair Co. v. *Lovingston,* an Illinois case, 23 Wall., 46.
Shufeldt v. *Spaulding,* 37 Wis., 668.
Brown v. *Clement,* 3 How., 667.

It would seem to be reasonable that if this is the rule as to land above water in excess of number of acres mentioned in the patent, that the patentee should take all in the quarter-section or sections, as the case might be, as fast as the same became uncovered by a recession of the water.

But I construe the decision of the United States Court in the *Hardin* v. *Jordan* case as in effect overruling the Michigan and Indiana rule.

What rule can be laid down from the authorities for a division of the bed of the lake between shore owners?

Much of the bed which was covered with water at the time of the survey of 1835 has since became dry land. The amount increases year by year, so that it is reasonably certain that within a few years after the completion of the work of deepening the Calumet river, now in progress, there will remain but very little, if any, of the

bed of Hyde Lake covered by water. The part that might remain covered by the water would be so shallow that the shore owner might, with a reasonable expenditure of money, make the same available for his own use.

Under the view I have taken of this case Shedd and Hardin are the only parties to this suit interested as shore owners. The side lines of Hardin's tracts, extended, would come in conflict with the side lines of Shedd's two tracts, if they were extended. Upon what principle shall the uncovered land and land covered with water be divided between them? The rule adopted in an Illinois case of dividing the center of thread line of the river into as many parts as there are lots owned by the shore owners on the river, and making such parts of the thread *pro rata* the size or frontage of the lots on the river bank, cannot be adopted in this case.

It would not be equitable to take the meander line as a basis for making the division according to the frontage, for the reason that it did not represent in fact the water line, notably as to southwest one-fourth of 20 and fractional section 29, there was uncovered by water, at the time of the first survey, several times the number of acres represented in the government survey as upland.

I have, after mature thought, concluded that to follow out the theory or principle laid down in *Hardin* v. *Jordan* as to the rights of shore owners and the division of the bed of the lake between them the court should, as near as possible, determine how far south the tongue of upland shown on government plat in southwest one-fourth of 20 did in fact extend at the time of the survey of 1834-5, and then treat so much of the water of the lake as lies west of that and between that and Hardin's land as a bay, and divide the same on the same principle that the United States Court decided the bay in front east fraction of southeast one-fourth of 30 should be divided.

AS TO SOUTHWEST ONE-FOURTH OF 20.

My conclusion from the evidence is that the point of land extended to about where the northern ditch between the two lakes was cut across at that point, which was about the south line of section 20. There was to the south

a space, a number of rods in extent, which was covered with water. The bay, which existed between this and Hardin's land on the west side of the lake, should be divided between Shedd and Hardin, and each taking in front of his land to the center of the bay. In dividing the bay, the equal division should be made by taking as a guide the meander line so far as shown on the government survey of 1834-5.

AS TO THE RIDGE EXTENDING NORTH FROM THE POINT OF LAND SHOWN ON MAP AS FRACTIONAL SECTION 29.

I find from the evidence that the ridge extended north in varying widths to the north line of southwest one-fourth of 29. That from there north to the south line of section 30 there was no continuous ridge above the water at the time of the survey of 1834-5. Where the south ditch was cut across there was a depression, but I think not sufficient to say there was water at that point from one lake to the other. While the court will regard the evidence as to what land was above water as controlling, yet where there is a doubt, it should be resolved in favor of the shore owner to the extent, at least, of the lowest fraction, into which the government subdivided lands.

Treating then the lake bottom between this ridge and the land on the west shore of the lake, as it was in fact, as a bay, it should be divided between the owners of the land on each side of the bay by a line drawn in the center of the bay. The east fraction of the southeast one-fourth of 30 formed a part of this ridge, exactly how far to the north it constituted a part of the ridge is uncertain from the evidence, but I am satisfied it did not go north of the north line of south one-half of southwest one-fourth of 29. That will be fixed as its north limit, the meander to be used as a guide in making the division, so far as the same is shown on the government survey of 1834-5.

There remains, then, between the south line of section 20 and the north line of southwest one-fourth of 29, a strip of land between Hyde Lake and the state line, which, I find was, at the time of the survey of 1835, practically all covered with water. There may have been

two or three small strips of land not exceeding ten acres in all above the water, insignificant islands. But at the time in question there was but one lake, extending from the west line of Wolf Lake, as shown on the official plat, to the Indiana state line.

The official plat of this survey of 1835 shows Wolf Lake as it existed only to the state line between the States of Indiana and Illinois. Why should not that line be regarded, as to the Illinois shore owners or patentees, as the line limiting their ownership of the bed of the lake? Should not this court in this proceeding, which partakes of the character of a proceeding *in rem*, having jurisdiction only over lands in this state, treat that state line as the line limiting the rights of the Illinois shore owners' ownership of the bed of the lake? So far as the plat shows the lake, we know nothing of it beyond the state line. An Illinois shore owner, it appears to me, can have no claim under such a survey and plat to the bed of the lake, or to the lands uncovered by recession of the waters beyond the state line, or, if he has any, it is not for this court in this proceeding to determine his rights as to land outside of this state.

In any event, a court of chancery, under the peculiar circumstances of this case, should, inasmuch as the evidence shows that a division of the original "navigable lake" by a north and south line would show the middle or center line to be near, but east of the state line, as between the parties to this suit, declare their rights respectively in the bed of the lake and the land uncovered by a recession of the water, up to but not beyond such state line. Assuming this to be equitable as to all the Illinois shore owners, it would follow that Shedd would own east of his strips of land (treating the same as extending to the south line of section 20), all the land and lake bed to the Illinois state line.

Also, he would take all between strips of land in section 29 (treating the strip as extending north to north line of southwest one-fourth of 29) and the Illinois state line.

Hardin would take all between fractional northeast of 30, as shown on official plat of survey of 1835, eastwardly to the state line.

I have been in some doubt as to the propriety of declaring the rights of the parties hereto to the lake bed without the other Illinois shore owners being parties. But if the principles here laid down are correct, the shore owners, not parties, are not injured. In any event, if their rights are affected, the decree cannot prejudice such rights. I am, however, of the opinion that I have power to adjust and settle the rights and equities of the parties hereto. The other shore owners may, perhaps, be bound as parties, styled "unknown owners."

This declaration as to the rights of the parties to the bed of the lake or lakes must not be understood as giving them an absolute ownership thereof like that a party may abquire to the shore land, or that they have acquired to the lands that became or shall hereafter be uncovered by the recession of the waters of the lake. Where a lake lies wholly within the land of one proprietor, it belongs to that proprietor as appurtenant to the land.

Menzies v. *Macdonald,* 2 Macqueen H. L. Cases, 463.
MacKenzie v. *Bankes,* 7 Rettie, 280.

Being a private water, the one proprietor owns and controls, not only the bed of the lake, but also all rights of fishing, boating, taking ice, etc., in regard to the water or use thereof.

But where there are several shore proprietors who own the bed of the lake in severalty to the thread or center, each owns the minerals or the stone which lie in that part of the bed of the lake owned by him in severalty. He owns the moss and has the right to drag for marl within his own lines.

Scott v. *Lord Napier,* H. L. Cases, 7 Macpherson, 35.
Rankine Law Land Ownership, 168-170.
Pomeroy Riparian Rights, p. 46.
Coulson & Forbes on the Law of Waters, p. 98.
Braxon v. *Bresler,* 64 Ills., 488.

And, as in Michigan, the right to build in shoal water docks for shipment of lumber from sawmills, *Rice* v. *Ruddiman*, 10 Michigan, 125, yet there are certain rights as to the water which covers the bed of the lake and the use thereof, which are common to all shore owners.

The water of a lake is first upon one owner's portion of the bed of the lake and the next instant upon another owner's portion, constantly changing and moving, and the fish, *ferae natura*, roam all through such waters; no one shore owner can have an exclusive ownership in either. The exclusive right of the owner to cut ice is the cause of ownership of the bed, and because of the water becoming, by being frozen, fixed and annexed to the soil.

Washington Ice Co. v. *Shortall*, 101 Ills., 429.
Clute v. *Fisher*, 65 Mich., 51.

The right of fishing, boating, logging and other rights which may be exercised upon or over the water, must necessarily be and are common to all the shore owners owning the bed of the lake. There are also certain rights belonging to a riparian owner, which do not depend upon the ownership of the bed of a stream or lake, as the right of access for his cattle and for domestic purposes, etc.

Coulsen & Forbes' Law of Waters, 85, 106, 121, 151.

In *Mackenzie* v. *Bankes, supra*, the court says:

> "There is a common right in a lake. What is that common right, and what is the unity of the lake which gives rise to that common right, and not only gives rise to it, but limits its extent? It must be with reference to the character of the right which is to be exercised. One can understand how this common right has grown up. A person proceeding from property of his own to boat or fish upon a lake, could not be arrested at the *medium filium aquae* of his land, or the moment he traversed the boundaries, which might be drawn on the extreme north or south or the extreme east or west of his lands."

These cases from the House of Lords, and other cases, are decisions as to lakes in Scotland and Ireland, but, I apprehend, announce the rule of the common law. The principles enumerated in the authorities cited are in consonance with what I understand to be the common rights of shore owners in lakes in this country. There are many questions arising in this case that I have not attempted to dispose of, because I deem it unnecessary to do so. A decree may be prepared in accordance with the views expressed, each party to pay his own costs.

Appendix No. 3.

Opinion of Judge Tuley at the second hearing. In the Circuit Court of Cook County.

Fuller *et al.* *vs.* Shedd *et al.* } *Settlement of Decree on Remanding Order by Supreme Court.*

Decision rendered August 10, 1897.

Tuley, J.:

I have held that no new evidence was admissible upon this motion for a decree in accordance with the remanding order of the Supreme Court; that the decree must be upon facts contained in the record and as found by the Supreme Court.

It would be useless for this court to find the facts different from what the Supreme Court has found them to be in its opinion reported in the 161 Ill., 462.

The adjudication of the Supreme Court, both as to the facts and law of this case, is final and must be followed by this court in complying with its mandate to enter a decree in acordance with its opinion.

The question, then, is (1): As to the facts which have been found by that court:

I have studied the opinion of Judge Phillips, filed in this case, with great care, and have concluded that the findings of facts settled by that opinion, as enumerated by the solicitors of Shedd in their brief, are substantially correct. I was of the opinion at the conclusion of the oral argument, and am still of the opinion that the controlling fact found by the Supreme Court, was that prior to the commencement of this suit, what was known at the time of the United States survey in 1834 as Wolf Lake had been for many years divided by a ridge of land whereby the one lake became two lakes, one to the west of the ridge, known as Hyde Lake, and the other to the east as Wolf Lake.

That at the time of the survey referred to, there was a ridge extending from the north side of the lake 220 rods in a southerly direction, and one from the south side of the lake in a northerly direction about 160 rods, leaving eighty or ninety rods between, covered with water in which reeds and coarse grass grew. (The head lands to which these ridges belonged, are owned by Shedd. Hardin owns land upon the west shore of the original Wolf Lake.)

That by the improvement of the Calumet River, into which there was an outlet from the lake, and from natural causes, there had been as early as 1874, a recession of the waters of the lake, causing dry land on both sides of the ridge; that by reason of this ridge the water of what was originally known as Wolf Lake became divided into two lakes, one known as Hyde, and the other as Wolf Lake.

This court, upon the final hearing of this cause, following the decision of the United States Supreme Court in *Mitchell* v. *Smale,* 140 U. S. Rep., and *Hardin* v. *Jordan,* which involved the rights of shore owners upon this same Wolf Lake, that the shore owners holding under the United States survey, owned the bed of the lake to the center thereof, and in making a partition between Hardin and Shedd, and other shore owners, extended the side lines of the sections and fractions thereof as surveyed by the United States to the state line between this state and Indiana, the center of the lake being in the latter state, and just east of such state line.

The Supreme Court of Illinois refused to follow the decisions of the United States Supreme Court, and held the law in this state to be that the shore owners upon a meandered lake, take only to the water's edge, following a prior decision of the court in

Trustees of Schools v. *Schroll,* 120 Ill.

And that while the United States patent to the lands on the meandered lake carried no right to the bed of the lake, it did give the shore owners riparian rights in the lake.

Also, "that when accretions come to such riparian proprietors they shall take to the water's edge and follow the recession of the water." The Supreme Court also held that such riparian owners can follow the water even if the recession go beyond the center of the lake, if there be no corresponding recession upon the opposite side.

This being the finding of the Supreme Court as to the law governing this case, this court must, in applying it, proceed upon the facts found by the Supreme Court as to the existence of the ridge of land by which the original lake became divided into two separate lakes.

The court must, therefore, make the division of the accretions and of the land made by the recession of the waters based upon the fact that by recession of the waters a continuous ridge had been formed from the land of Shedd on the north to his land upon the south side of the lake, whereby what had been surveyed as one lake had become two lakes.

The court in making the division must follow the recession of the water in both lakes. In so doing there can be no application of or room for the application of the doctrine of extension of or from the side lines of original government survey as contended for upon the part of Hardin.

The side lines of the Hardin property on the west side of Hyde Lake cannot upon any reasonable theory be extended across Hyde Lake and over the ridge-land so as to reach the waters of Wolf Lake. His only riparian right is to follow the water in front of his land, to wit: the waters (now) of Hyde Lake.

Ownership of accretions must be by reason of the ownership of the contiguous lands to which the accretions become attached. The accretions or dry land which became a part of the ridge never became attached to the land across the water upon the opposite side of Hyde Lake.

To apply the law as laid down by the Supreme Court of Illinois, the water must be followed and the land made by the recession of the water must be given to the

owner of the land from contact with which the water receded.

The court cannot in making partition make a guess as to how much land Shedd or Hardin should have, but must follow the water and its recession to contiguous land without regard to the quantity of land which will thereby fall to one or the other owners.

I have endeavored to follow the findings of the Supreme Court as to the situation or condition—as shown by the evidence and record in this case—of the waters of what was known originally as Wolf Lake, and have treated the land (covered by water) between the two points or ridges shown in the survey of 1834-5 as having become dry land, by reason of the accretions to or recession of water from contact with said two points or ridges; whereby what was one lake became divided into two lakes, one known as Hyde Lake and the other as Wolf Lake.

Upon that finding I have tried in the division I have made to divide the accretions and new land by following the water in its recession.

I have adopted the findings in the decree prepared by Mr. Shedd's solicitors as being correct, and also have followed the descriptive lines as run by said draft of decree as to Shedd's portion, except that I have extended the line running north between sections 29 and 30, to a point identical with the northwest corner of the southwest quarter of section 29, if fully squared out, thence I have run a line northwesterly at an angle of forty degrees to the waters of Hyde Lake, thence in a northerly or northeasterly direction along the waters of Hyde Lake, as in the original draft.

As to Hardin's land I have extended his north line, commencing at the center of fractional section 19, due east to the waters of Hyde Lake, and thence along the waters on the west side of Hyde Lake in a southerly direction and around the southern extremity of Hyde Lake and following the water in a northerly direction up to the line referred to in the description of Shedd's portion as being drawn at an angle of forty degrees from the

northwest corner of the southwest quarter of section 29 in a northwesterly direction to the waters of Hyde Lake.

After a careful study of the opinion by Judge Phillips, and also of the evidence and all the voluminous and able arguments of counsel, I have concluded that this is the most equitable division I can make, if I follow—as I must—the findings of the Supreme Court.

I have signed the decree amended in the particular points referred to.

Appendix No. 4.

Opinion of Seaman, J.

Circuit Court of the United States for the Northern Dist. of Illinois, N. D.

Gertrude H. Hardin
vs.
Conrad N. Jordan.
} *Consolidated Causes.*

On motion to direct the marshal to refrain from executing the writ of possession as to certain portions of the premises named in the writ, and cross-motion of plaintiff for directions to proceed in the execution.

My impressions at the close of the hearing were, as informally stated, that there was no occasion for any express order in the premises, one way or the other upon the facts shown. But having held the matter open for further consideration I am of opinion, in view of the rule, that *prima facie* all parties entering after suit brought are to be taken as holding possession in subordination to the title of the defendant in ejectment, that a duty rests upon the court to make such order in reference to persons in possession who are not parties to the cause as will restrict the writ to its legitimate function and not leave to the marshal to determine any questions of claim or title extrinsic to his writ. *Hall* v. *Dexter*, 3 Sawy., 434 Fed. Cas., No. 5929.

I have therefore taken into consideration the affidavits and claims presented upon this hearing and my conclusions are:

(1.) That the tenants, William Bush and Frank Schulte, entered into possession during the pendency of this action under the defendant Jordan, and were and are concluded by the judgment. Their attempt to attorn to the claimant, Shedd, after the entry of this judgment is inoperative and cannot save them from the force of the judgment.

(2.) The occupant, Gahanaty, appears to have entered about a year ago, during the pendency of the action, but under Shedd, who claims independent title, antedating this suit. The fact alleged in the affidavit of Mr. Hardin that this portion of the premises was originally in the lease from Jordan to Schulte would not defeat this independent claim in the absence of any showing of actual possession by Schulte and his attornment to Gahanaty. Therefore any subordination to the title of Jordan which would otherwise appear from this later possession, is removed, at least on the face of the showing; and without showing of collusion or priority between Shedd and Jordan or those claiming under him, this possession is not affected by the judgment.

(3.) The occupant, Neubeisser, is alleged to have entered and held under Shedd from April, 1888. Whilst there is some suggestion that there was a previous possession under Jordan through his tenant, Fogli, it is not clearly shown, and there is no showing of priority or collusion. Therefore this possession is not affected by the judgment or writ.

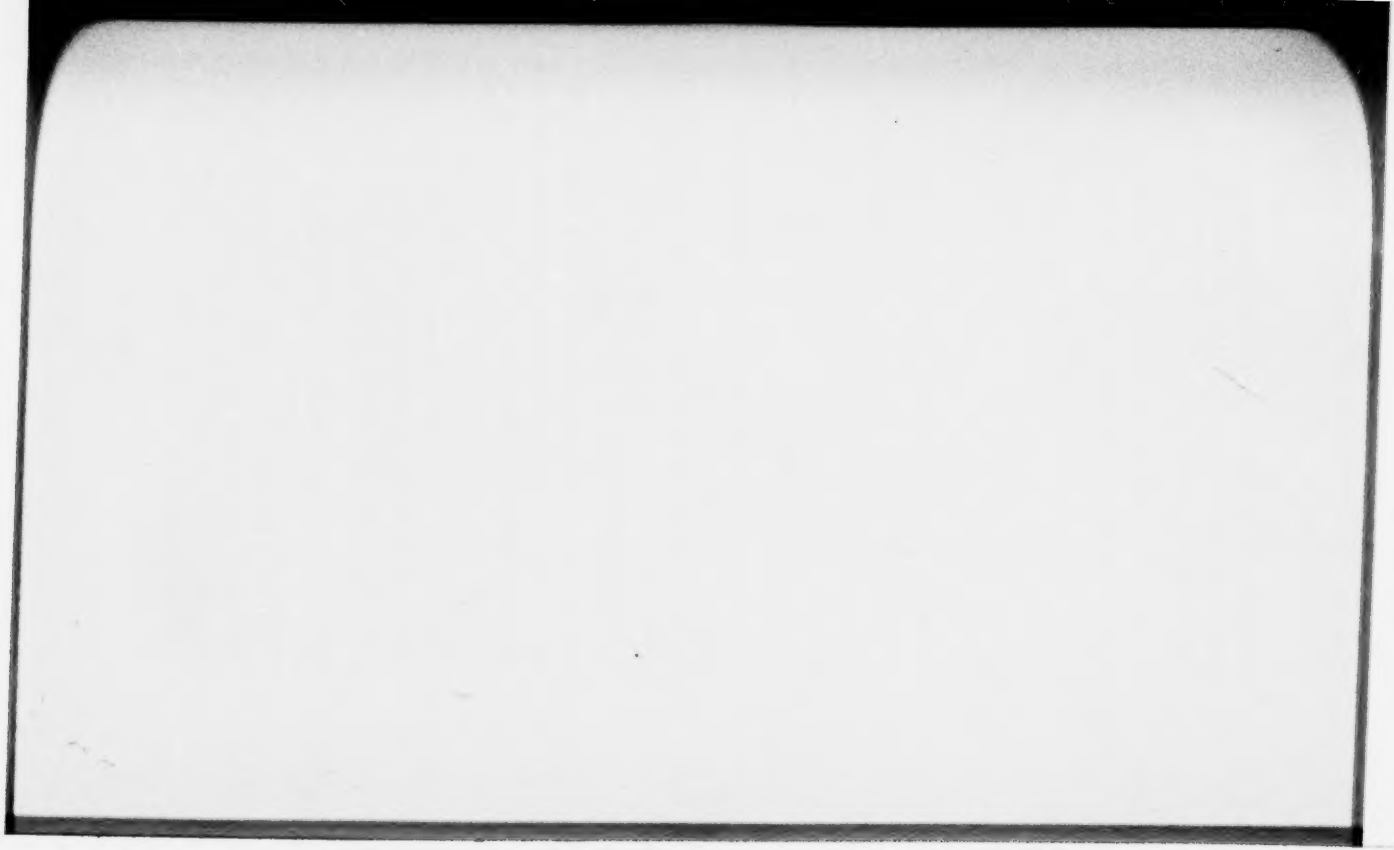
This action is in ejectment and determines only the rights of possession, and incidentally the title as between the parties and those holding under them. A former judgment of this court in favor of the defendant was reversed by the Supreme Court, *Hardin* v. *Jordan*, 140 U. S., 371. The present judgment was entered December 10, 1896, all contest on the part of the defense being withdrawn. It is entirely foreign to this inquiry, whether there was any room for contest, under the opinion and mandate from the Supreme Court, or whether the decision by the Supreme Court of Illinois, upon the same subject in *Fuller* v. *Shedd*, 161 Ill., 462, 44 N. E. Rep., 286, wherein this plaintiff was a party defendant, could be given effect or consideration in the present case. The judgment as entered is undoubtedly conclusive between the parties of record and all holding under them for either title or possession. But of its own force it cannot be regarded as a rule of decision for causes affecting other rights or parties in this court. As between the parties to this action the judgment is determinative until reversed,

set aside or modified; and of course its execution would not abide the action of any co-ordinate court. On the other hand, this proceeding at the foot of the judgment should not operate to extend its force beyond those parties and privies, and does not call for any rule which would affect other parties or actions, either in this or other courts.

This order will be entered: That the writ of possession shall not affect the occupancies of Gahanaty or Neubeisser until the further order of the court in the premises; that the marshal may proceed with its execution as aainst the tenants, Bush and Schulte, but may require from the plaintiff a sufficient bond to indemnify him therein before so proceeding. So ordered.

(Endorsed): Filed February 8, 1897.

S. W. BURNHAM, *Clerk.*



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No. 268. 56

Reply Brf. of Dent for P. E.

Filed Jan. 27, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 268.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY,
PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Illinois.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

THOMAS DENT,
FOR PLAINTIFFS IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

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Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

Reply Brief for Plaintiffs in Error.

I.

WHAT IS TO BE REVIEWED? WHAT INQUIRY DOES THE WRIT OF ERROR PRESENT?

The brief for the defendant in error suggests, presumably in a Pickwickian sense, that the subject to be reviewed is "the judgment of the Supreme Court of Illinois rendered in *Hardin* v. *Shedd,* 177 Ill., 123."

It should have been said the writ of error is applicable to the case as a whole, and therefore brings into question, as particularly, the earlier decision of the same court, as reported under the title of *Fuller* v. *Shedd,* 161 Ill., 462, and especially involves, also, the decree rendered by the Circuit Court of Cook County on the 11th of August, 1897, after the case, as first reported in the Supreme Court of the state, being reversed in part, was remanded to the lower court for further proceedings.

This matter was clearly stated in the petition for the writ of error. (Rec., 1, 2.)

The writ acts on the record, removing the same to this tribunal for review. It is a continuation of the original litigation, rather than the commencement of a new action.

Nations v. *Johnson*, 24 How., 195 (16 Law. Ed., 628).

Why the learned counsel should refer to this writ of error as having reference only to the last report of the case in the Supreme Court of the state is not clear. But, indeed, from later suggestions in his brief it appears that he apprehended the nature of the inquiry as involving, as above stated, the correctness of the decree which the Supreme Court of the state finally affirmed.

Of course, if the matter stood upon the decree which was first rendered, conforming, as that decree was at least intended to conform, to the decision of this court in *Hardin* v. *Jordan*, 140 U. S., 371, the present writ of error would not have been sued out; for the decision of the court was not then adverse to the claim set up by the present plaintiffs in error as existing in their behalf under the land patents through which their title inured. But when the Supreme Court of the state in the case as reported in 161 Ill., 462, denied the right or title set up by the plaintiffs in error to the submerged lands, it was only necessary to await a final decree and the consideration thereof upon the appeal reported in 177 Ill., 123, to bring the case here by writ of error for review.

II.

HOW WAS THE QUESTION BY REASON OF WHICH THE CASE IS REVIEWABLE IN THIS COURT UNDER § 709 OF REVISED STATUTES UNITED STATES PRESENTED?

That there was such a question in the state court, and that it was passed upon there, both by the trial court, sitting as a court of equity, and by the Supreme Court of the state sitting in review, is clearly evident from the record. The fact, as the learned counsel himself suggests, appears from a certificate of the Chief Justice of the latter court; which certificate, it may be added, was signed with the approval by "O. K." of the learned counsel. (Rec., 2, 3.)

The certificate would have in its favor, independently of such approval, the presumption suggested in *Armstrong* v. *Treasurer of Athens County,* 16 Pet., 281, 286, where the propriety of such certificate was sanctioned.

The counsel quotes at pages 3 and 4 of his brief a part of one of the pleadings of plaintiff in error Gertrude H. Hardin, showing that by virtue of the patents from the United States under the survey of 1834-5 she claimed not only the specified area or acreage of the patented tracts, bordering on a non-navigable lake, but also ownership to the center of the lake. This claim was made in the state court with ample fullness. (Rec., 30-32, 42-3, 46-7.)

It was distinctly averred, among other things, that the lake bed passed to the patentees from the United States (Rec., 42), and therefore to Mrs. Hardin, the party so claiming.

The other plaintiff in error also claimed on the same theory to the center of the lake. (Rec., 48.)

This claim was recognized by the decree first rendered; but the Supreme Court of the state decided against it. (Rec., 481.)

Mr. Justice PHILLIPS, speaking for the court, said in the opinion in 161 Ill.:

> "We are asked to * * * hold the grant (from the United States) to the riparian owner conveys the bed of a non-navigable lake. * * * We decline to do so." (*Ib.*)

Earlier in the opinion it was said:

> "The main question presented on the pleadings and facts appearing in this record is, whether the title of the riparian owner on a lake meandered in the original survey by officers employed by the United States for surveying public lands, extends to the center of the lake or stops at the water's edge." (Rec., 466.)

The defendant in error claimed the submerged lands by certain definite descriptions as tracts, as well as the lands patented which originally were on the border of the lake; and that claim, not only as to himself, but also as to the plaintiffs in error, was recognized by the decree first rendered. But on assignment of errors by contestants for the title to the lake bed (Rec., 466) a reversal of the decree in that regard was adjudged, and the case was remanded to the court of original jurisdiction for further proceedings.

It became necessary, therefore, as has heretofore been said, that such further proceedings should be had, and that the case should again go, as it did go, to the Supreme Court before the judgment could be said to be final in the sense of being subject to review here.

In almost every conceivable form the claim of title to the submerged lands or lake bed, under the certificates of entry and the patents, was made, not only in the Circuit Court, but also in the higher court, as distinctly as such claim was made in *Hardin* v. *Jordan, supra*, and *Mitchell* v. *Smale*, 140 U. S., 406, and even more distinctly.

The learned counsel questions, seemingly, whether some special statute might not have been cited to make it clearer what was the claim. But to what useful purpose could any further citation have been made?

The fact that the defendant in error claimed, though in a less distinct form of averment, title through the patents to De Witt and Douglas, respectively, to distinct parts of the lake or lake bed, does not militate against the propriety of the present writ of error. Both parties could well claim such right, and upon its denial by final decree, to one or both, the right to review, on the part of the party aggrieved, arose. This principle was declared or reaffirmed in *Buel* v. *Van Ness*, 8 Wheat., *312, *324 (5 Law. Ed., 624, 627).

As stated above, a distinct claim of title under authority of the United States, as resulting from its sale and conveyance, on which the plaintiffs in error relied as entitling them to hold not only to the edge of the waters of the lake, but to its center, was made by the pleadings, and this was sufficient.

Armstrong v. *Treasurer of Athens Co., supra.*

It was there, as again in *Medberry* v. *Ohio*, 24 How., 413, held that this court may ascertain from the pleadings whether "one of the questions which this court has jurisdiction to examine and review was actually decided by the state court."

It should be remarked, also, that the final decree, while it declared that the purpose of the meander of the lake "was to ascertain the quantity of upland to be charged for," and "not to limit the respective grants to the meander" (Rec., 439), yet did declare, in opposition to the claim made in the pleadings, that when the survey was made by the United States, and when the United States sold and issued patents for the several tracts claimed by the parties to the present record, the submerged land of the lake or lakes, with the waters thereof, was held and controlled by the State of Illinois. (Rec., 439, 440.)

This was a denial of the right which had been set up in the pleadings as aforesaid, a denial which the trial court entered, under the direction, as it supposed, of the Supreme Court of the state, which had refused to affirm the former decree, by which such right had been sanctioned. The denial is embodied in the decree itself, which the court may notice with reference to this question. *Armstrong* v. *Treasurer of Athens Co., supra.*

III.

The learned counsel suggests that the local law of the state governs the construction to be given grants of land bordering upon waters, whether navigable or non-navigable. BUT HE DOES NOT ANSWER THE POINT THAT THE CONSTRUCTION OF A GRANT BY THE GOVERNMENT AS PRIMARY OWNER IN RESPECT TO LANDS EMBRACING NON-NAVIGABLE WATERS, IS A MATTER TO BE DETERMINED BY THE COMMON LAW; NOT BY THE VOLITION OF A STATE COURT, NOR INDEPENDENTLY OF THE VIEWS OF THIS COURT IN SUCH CASES.

The cases cited by the counsel are cases of navigable waters; not cases involving title to submerged lands in non-navigable waters. The lands submerged by small non-navigable lakes and non-navigable streams alike were, as on argument here will be seen, subject to be surveyed and sold by the United States; and therefore they could not be held to belong to the state in the absence of specific grant. All the cases cited in *St. Anthony's Falls Water Power Co.* v. *Board of Water Commissioners,* 168 U. S., 349, like that case, itself, involved questions as to riparian rights in or connected with navigable waters, wherein the states admittedly had rights of sovereignty, permitted to them by acts of Congress as construed by this court.

The cases do not any of them support the advanced position of counsel (page 28 of his brief), that the state took title to this non-navigable lake "by virtue of its sovereignty."

Again, the question of navigability was one of fact, not to be decided by choice or dictum; and when a stream or body of water is to be placed in that class the grounds for so placing it must be shown.

The counsel suggests in the same connection "that by the sale and patenting of the lands to private parties the government abandoned all its title and yielded the lands wholly to the sovereignty of the state." (*Ib.*)

That is certainly a novel theory. What show of authority can there be for such a proposition, or for supposing, for example, that as the United States sold one tract after another bounded by the lake, it would by its grant pass the title to the submerged land to the state? That would be a strange construction of a patent. In name the patent ran to an individual. The construction

asked by the learned counsel is, that the patent be held to operate in favor of or run to the state as well.

However, the learned counsel added, "It (the supposed proprietary right of the state to this non-navigable lake) is the same character of title as was held to exist in the State of Illinois in the bed of Lake Michigan in *Ill. Central Ry. Co.* v. *People,* 146 U. S., 387."

When analyzed, the argument of counsel would seem to be that this non-navigable lake is to be placed in the category of navigable waters to give the state sovereignty over it.

What show of reason is there for holding that the title to the beds of non-navigable lakes within the North-west territory was held by the United States in trust for the future states, the same as the bed of Lake Michigan, or a like inland sea, was held?

There is something akin to confusion of thought in deducing from the right of the state to exercise police powers the claim of a proprietary right in non-navigable waters, as a foundation for the exercise of such powers. The learned counsel realizes that there is a distinction between a title coming by grant and one connected with sovereignty on the part of the state upon its admission into the union on an equality with the other states of the union; but he would obliterate the distinction in this case, because of a fiat of the Supreme Court of the state enforcing a former dictum of the same court.

IV.

Reference has been made herein to the statement in the decree as to the purpose or object of the meander.

Is it possible from the finding of the court in that regard to discover any support for the theory that because the lake was meandered the title to the submerged land therein passed to the state? The finding itself negatives the suggestion, and lays bare the suggestion of the argument of inconvenience of division as the reason, forsooth, for the claim for the state made by its highest court, assuming to decide absolutely how a government grant should be construed.

Why, if such claim was to be made, was it not made before the passage of the swamp land grant, or in the controversy in the land office over the survey of 1874 and the pre-emptions allowed because of that survey? Or why, again, was it not made before the submerged lands were taxed? Why did not such claim emerge until the court advanced it as the reason for reversing the decree first rendered in this case?

V.

Some observations of the learned counsel might imply that there was a finding that Hyde Lake was originally a separate body of water. The record does not so show. Nor, indeed, does the argument of counsel go so far. He merely maintains that it had become "such land" (meaning lake, probably) prior to this suit. (P. 41 of the brief of counsel.)

But it is to be noted that if there were two lakes, there was but a single meander, running around both of them, and no meander of them as separate bodies, and the main theory of the state court, as advanced in the opinion by Mr. Justice Phillips, for claiming title in the state, to wit: that he was dealing with a meandered lake, would fall.

VI.

AS TO SKETCHES OR DRAWINGS SHOWN IN THE BRIEF OF THE LEARNED COUNSEL.

All are in the main conjectural or intended to illustrate theories, Nos. 1, 2 and 3, for example, to enforce the idea that there were tongues of land having a tendency to separate the lake into two bodies; an intervening low or marshy place becoming dry land in the course of time, and thus completing the separation, and thus also adding, under the accretion theory, to the lands of the defendant in error in the various directions in which the water receded from such elevations or from the original shore lines of the DeWitt and Douglas tracts.

Of such drawings, it is also to be said that they do not follow the supposed findings relied upon by counsel as appearing from the opinion in *Fuller* v. *Shedd*.

For example, the islands mentioned in the opinion by Mr. Justice Phillips as "islets" or "islands, one a mere knoll" (Rec., 464), do not appear in the sketches; though the findings in the decree (Rec., 447) passed such islands bodily to the defendant in error, on the principle that as they were in the lake, and supposed to be in front of his land, the patent carried them along with the tracts on the shore of the lake. As to such islands, see Shedd's Ex-

hibit Map C (Rec., 91), showing elevations appearing like islands with water at datum, the stage represented by said map.

Sketch or Map No. 4, given by counsel (p. 45 of Mr. Mecartney's brief) is made the basis of some criticisms upon the apportionment by the first decree, the decree which was reversed by the Supreme Court of the state. But the sketch does not represent the findings under that decree. For example, the sketch extends the supposed ridge much further south than the decree allowed. It does not illustrate at all the attenuated or narrow, and in some places thread-like form of the supposed ridge, characteristics appearing from the evidence. The same remarks apply to all the other drawings given in the brief of counsel. They are not in conformity with the evidence as to the natural depressions.

The observation of the learned counsel at page 46 of his brief that "In sketches 4 to 7 the green denotes land awarded to Mr. Shedd, the pink shows that awarded to Mrs. Hardin," would undoubtedly be admitted by the counsel to be inaccurate if he were to weigh the import of the observation. Sketch 4 comes more nearly than do the other sketches to representing the reversed decree. The other sketches do not compare with either decree. Map No. 8 in the brief of plaintiffs in error (p. 176 of brief), shows Wolf Lake and Hyde Lake, both conjecturally, or as per "Jordan's Map D," and illustrates the final decree as between the parties to this record, excepting that the strip of land belonging to the Cook County Canal and Dock Company is included with other tracts, and is not separately shown.

An observation of the learned counsel as to his Sketch

No. 7 (see p. 54 of his brief), could not have been well considered. He speaks of the sketch as "showing a proper apportionment in a lake or lakes of a shape similar to Wolf and Hyde Lake upon the basis of private ownership of the bed."

Why should he say lakes in that connection? Why should he not look to the official plat, by which all parties were governed in buying? Why, from owning two small fractions of 4.53 and 7.37 acres, respectively, should he take nearly a half of the body recently called Hyde Lake and almost half of what is still known as Wolf Lake? Why should he deprive us of rights as part owner of the Egan tract? What basis is there for such side lines as the sketch represents?

The sketch would cut off the shore tracts of the plaintiffs in error from the present Wolf Lake, and take no account of "the natural depression," by reason of which there was originally but one lake. The theory of the learned counsel, under this sketch, would give his client the residue of Wolf Lake, or the most of it; not only the part in green, but the part in buff.

The sketches given in Mr. Mecartney's brief as Nos. 5 and 6 favor, measurably, extension of our west shore tracts, or rather one of them, by converging side-lines, to Wolf Lake; but all are to support theories in respect to accretions; and as a division on any such basis is legally inadmissible, because no title in the state has in any way been shown, further examination of those sketches is dismissed.

VII.

MISCELLANEOUS POINTS.

It is not understood, as counsel supposes, page 32 of his brief, that either of the plaintiffs in error produced or put in evidence the statement preceding the opinion in *Fuller* v. *Shedd*. The statement (161 Ill., 463, 470), is supposed to have been prepared, as usual, by the judge who delivered the opinion; and where the statement and opinion differed, one might to some extent explain or correct the other. In this sense all went together in the Circuit Court; and while it is true that his Honor Judge Tuley regarded the one or the other or both as equivalent to findings of facts, by which he felt bound to be guided, yet, after all, there are no findings that are binding here. The evidence is open to investigation.

Of course, it was to be expected, when the case was heard a second time, that the present plaintiffs in error were bound by the decision of the higher court until it should be reversed, yet that they were entitled to due protection until a hearing in another tribunal, free to examine the whole case, could be invoked.

A reflection upon Mr. Isaac N. Hardin as a witness supposed to have repeated industriously the term "Elm Island" in Mr. Mecartney's brief (p. 48) does not seem to be borne out by the record. The first use of the term, in point of time as to this record, seems to have been by William Gardner, a witness who testified by deposition for Mr. Shedd. (Rec., 375.) In testifying at the hearing Mr. Shedd himself, on direct examination, referred to that elevation. (Rec., 73.) Instances of the use of the

same descriptive phrase, but not by Mr. Hardin, occurred in the evidence of sundry witnesses. (Rec., 279, 322.) Mr. Hardin referred to this elevation as "Field's Place" or "Fogli's House." (Rec., 352-7.) He, however, spoke (Rec., 353) of "the wooded elevation south of Smale's Point" as being an island. (This was in 1885.) Indicating in his evidence (Rec., 355) where Smale's Point was, he spoke of that point being connected by a corduroy road, with an elevation of land to the west and south called at the trial "Island." This was a different elevation from the one called "Elm Island," the latter being farther south.

An allusion in the brief of the learned counsel (p. 52) to Mr. F. C. Rossiter, one of the surveyors who testified at the hearing, should not be treated as a damaging criticism. It should have been remembered as to him, that he was a witness for the defendant in error (Rec., 369-371), called to show examinations and surveys as to the ridge and the depressions south of it. In explaining them at the hearing, he stated the depth of soil placed upon the corduroy road constructed in the depression south of south-west fractional quarter of Section 20, and he also showed measurements by him in 1883 as to land in the tongues, or so-called "Ridge," south of that tract; the estimate being of 4½ acres in the western tongue and 10.26 acres in the eastern tongue. (Rec., 370.) He found water in the natural depression. (Rec., 371.)

While the witness testified of the acreage of tongues or elevated lands connected with south-west fractional quarter of Section 20 in 1883, it does not follow that there was such acreage in 1834, nor that the correctness of the meander in 1834 and 1835 is impeached. The govern-

ment plat of the survey shows how the surveyor found the lake at those dates.

It is an error to suppose, as is intimated in the brief of the learned counsel at page 41, that there has been a finding that "Hyde Lake had originally been a separate body of water." Nor does the qualification added by counsel, "or had became such * * * prior to the suit," put the matter in good form.

The suggestion, on the same page, that there have been findings in this case of "the water in 1834-5 * * * at 2.2 feet above datum," is quite at fault. A statement in the opinion by Mr. Justice PHILLIPS (p. 467 of record in this case) that "the level of the waters of Wolf Lake when the same reach about the meandered line of the original survey would be about 2.2 feet above datum" may have seemed to the counsel to favor his suggestion. *Non constat,* however, this height of water may have been much greater. That the waters were much higher when the original surveys were made appears from the field notes as explained by the surveyors who testified at the hearing of this case. (See former brief for plaintiffs in error, pp. 34-36.) Much higher elevations of water, at periods after 1874, are shown by the evidence. (*ibid.,* 38-47.)

It should be remembered, too, that in the contest in the land office it was found (Rec., 94) that the water had permanently receded prior to the second survey, which was in 1874, and that there was "a failure to show that the plat of the survey did not correctly represent the boundaries of the land in 1850."

Why was the latter date stated in the opinion of the Commissioner of the General Land Office? It was be-

cause the State of Illinois claimed under the grant by the Swamp Land Act of September 28, 1850, and the Illinois Central Railroad claimed under the Land Grant of September 20, 1850. (*Ib.*) The claims were not considered as predicable with reference to land which had become unsubmerged in later years. (*Ib.*)

The learned counsel suggests (p. 45 of his brief), that Judge Tuley found the center of the lake to be in Indiana, a little east of the state line of Illinois. His opinion shows that a division of the original "Navigable Lake" by a north and south line would show the middle or center line to be near, but east, of the state line. (Opinion following brief for plaintiffs in error, p. 216.)

It is said by the learned counsel (p. 44 of his brief) that the "defendant in error in fact takes no more land by the decree upon the accretion basis than he would have taken if the title to the submerged lands had been held to have passed under the patents."

If he would take as much in following the decision which this court made in *Hardin* v. *Jordan,* should he object to that decision?

But he does undoubtedly get very much more under the decree which the Supreme Court of this state affirmed than he could get upon the principle of attaching to his upland as patented a proportionate part of the lake bed; and he gets it at the expense of the plaintiffs in error. Hence, their request to look into the basis of the decree.

The claim of title by the defendant in error as coming through the state, and on the theory of accretions, is violative of rules of property. It ignores the fact that the United States had full proprietary title when the lands were brought into market, and never parted therewith ex-

cept by the patents. It treats the meander of the lake as having had magical power, a power to transform the lake from its innavigability in fact to a supposed equality with Lake Michigan; forgetting that in the case of the latter lake the rights of navigation control, while with this evaporating and evanescent sheet navigation had nothing to do.

VIII.

Conclusion.

The present record was made up as per stipulation, and has embodied in it the evidence as to physical conditions and other matters which the counsel desired to have before the court. Much of the evidence for the second patentees thus remains in the record; all, indeed, as to physical conditions. Of course, this was for the purpose of enabling the court to pass upon the main question as to the title or rights of patentees under the patents; and, of course, upon the incidental question whether the state took title because of the meander. The record raises the general question how patents for land bordering on a non-navigable lake should be construed as to title to the lands submerged at the time of the government survey.

It is hoped that enough is shown to enable the court to direct a decree, which it is believed will be more just in its provisions, because conformable to the common law, and more faithful to public interests and the maintenance of law and equity.

Respectfully submitted.

Thomas Dent,
For Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

No. 56.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY, PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

ADDITIONAL SUGGESTIONS FOR THE PLAINTIFFS IN ERROR.

I.

THE RADICAL ERROR OF THE SUPREME COURT OF ILLINOIS IN DETERMINING AS MATTER OF LAW THAT THE MEANDER OF THE LAKE, RECOGNIZED AND FOUND BY THAT COURT TO BE A NON-NAVIGABLE LAKE, VESTED TITLE IN THE STATE, VITIATES THE JUDGMENT AND THROWS OPEN TO CONSIDERATION THE STATE OF THE RECORD BEARING UPON THE QUESTION OF APPROPRIATION OR APPORTIONMENT AS BETWEEN THE PARTIES.

Upon this question the rule stated in *Green vs. Lessee of Neal*, 6 Peters, 291, 298, is to be maintained; for, as was there said:

> "On all questions arising under the Constitution and laws of the Union, this court may exercise a revising power; and its decisions are final and obligatory on all the tribunals, State as well as Federal. A State tribunal has a right to examine any such questions, and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised."

The writ of error in the present case being for the reversal of an erroneous judgment, a judgment which was erroneous because the court below denied the claim of the plaintiffs in error as to the ownership under the Government patents of any part of the lake bed or submerged lands, the case is subject to revision here, because the denial was based upon a question of law, and the revision may come likewise if the decision was based partly upon a question of fact, the finding of which was from or with reference to a disregard of the rights acquired under the patents; LYTLE *vs.* ARKANSAS, 22 Howard, 193.

The question whether the running of a meander line by the surveyor amounted to a surrender, or offer of surrender of the lake, segregating it from the public domain, was a question of law. All the questions of fact connected with it in any manner, including the fact that the meander on the north side of the lake was twice run, and the fact that the line itself was not shown on the plat nor marked on the ground by any monuments, only the general course of the lake being thereby shown with reference to enabling the Commissioner of the General Land Office to estimate the area or acreage of fractions bordering on the lake, can be taken into consideration by the court in determining what is the law of the case as to apportionment between proprie-

tors who purchased from the United States tracts having the lake as a boundary.

There comes in a principle stated in *Dower vs. Richards*, 151 U. S., 659:

> "When" (in a claim of right under the Constitution and laws of the United States) "the question decided" (in denial of such claim) "is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency or legal effect of the evidence as bearing upon a question of Federal law, the decision may be reversed by this court."

Also, as was held in *Republican River Bridge Company vs. Kansas Pacific Railway Company*, 92 United States, 315, 317:

> "Where a right is set up under an act of Congress in a State court any matter of law found in the record, decided by the highest court of the State, bearing on the right so set up under the act of Congress, can be re-examined here" (*Id.*, 216).

Such findings as may be supposed to have been made in the State court proceeded upon the application of an erroneous view of the law, and may therefore be reversed and set aside by this court.

This remark applies especially to all that succeeded the declination of the supreme court of the State of Illinois to—

> "hold (that) the grant to a riparian owner conveys the bed of a non-navigable lake, and makes its waters mere private waters" (Record, 481).

The holding of that court, in addition, was that as to any meandered lake, irrespective of size—

> "The State exercises control, and holds the same in trust for all the people, who alike have benefit thereof in fishing, boating, and the like" (*Id.*).

The court thus likened all non-navigable lakes or ponds, when any of the same happen to be meandered in the public surveys, to navigable waters or any great inland sea, like Lake Michigan, for example, and would entirely obliterate, as to meandered lakes, the distinction between navigable or public waters and those which are non-navigable or private. In adopting such a novel declaration with regard to the deputy surveyor's act of running a meander line, the supreme court of Illinois was not consistent with itself; for it expressly recognized various prior decisions of its own, beginning with *Middleton vs. Pritchard*, 3 Scam., 510, putting an entirely different construction upon the purpose and effect of a meander line (Record, 473-'4; opinion by Mr. Justice Phillips). In making that declaration, too, the court omitted to recognize the fact that the police power of the State is as extensive in reference to private waters as it is in respect to public waters, so far as the interests of the public have any real and practical concern therewith; which principle was recognized by the circuit court of Cook county (Record. 424,) in its decree as first rendered, intended to follow, in substance at least, the decision of this court in *Hardin vs. Jordan*, 140 U. S., 371, and *Mitchell vs. Smale, Id.*, 406.

II.

THE APPLICATION OF JUST PRINCIPLES REQUIRES A CONSIDERATION OF THE LAW AND OF THE FACTS IN THE RECORD BEARING THEREON AS TO THE EXTENT OF THE RIGHTS OF THE APPELLANTS IN RESPECT TO THE CONSTRUCTION AND EFFECT OF THE PATENTS THROUGH WHICH THEY CLAIM AND HOLD TITLE.

Here it may be contended adversely that some force or effect should be given to the findings upon which the first decree was based. To this it may be answered that while the supreme court of the State did not in express terms ob-

ject to such findings as were embodied in the decree, yet it did reverse the decree, and therefore such findings have no present force or effect, and are not binding upon any court. Again, the findings by or under each decree were a departure from the pleadings as between the parties to the present record (Record, 26, 50). On the side of the plaintiffs in error the pleadings made reference to what had sometimes been claimed to be a narrow spur or promontory of land, said to extend in a southwesterly direction from what is shown on the plat as S. W. fractional ¼ of section 20. In describing the ridge as it existed at the time of the commencement of this suit, it was stated that at certain stages of water it extended half way across the space shown on the plat as covered by the lake towards the point of land comprising the east fraction of S. E. ¼ of section 30 and fractional section 29, as shown by the plat, with the exception that about half way down the extent of said spur of land stretching from said section 20, as aforesaid, there was an opening or space through which the water passed at ordinary stages, etc. (Record, 26), and in the answer of the defendant in error the allegations in this regard were admitted (Record, 50).

It is apparent, therefore, that there was upon the pleadings an admission differentiating the case as to this supposed spur from the decree as first rendered, and also in a more marked manner differentiating it from the opinion of the supreme court of the State, which was intended to be carried out by the decree finally rendered.

The admitted facts upon the record will authorize this court to act independently of the inconsistent findings intended to carry out what must be recognized as an erroneous view of the law.

Besides this, if we bring under consideration the decree of August 10, 1892 (Record, 416–424), and look into the opinions of his honor, Judge Tuley, which by stipulation with counsel for the defendant in error have been shown in appendices to the brief of plaintiffs in error (pp. 189–219),

we shall find that his honor did not base his findings upon actual evidence as to the condition of the lake as to land and water at the time of the survey of 1834–'5. (See his opinion at page 200, brief of plaintiffs in error.) But he based his decree more upon what he regarded as a fact from the special findings of Mr. Justice Gresham, which were as of the time of the decision made by that learned judge, namely, in 1885 (*Id.*, 199). Those findings are not, however, in the present record.

While Judge Tuley thought there was some land inside of the meander line in S. W. ¼ of section 20 and in fractional section 29, at the time of the survey of 1835;

yet he found it to be

> " impossible from the evidence to ascertain the exact quantity of such land " (*Id.*, 200).

He further found that the survey of 1834–'5 was to be adjudged from the evidence to have been

> " made in good faith."

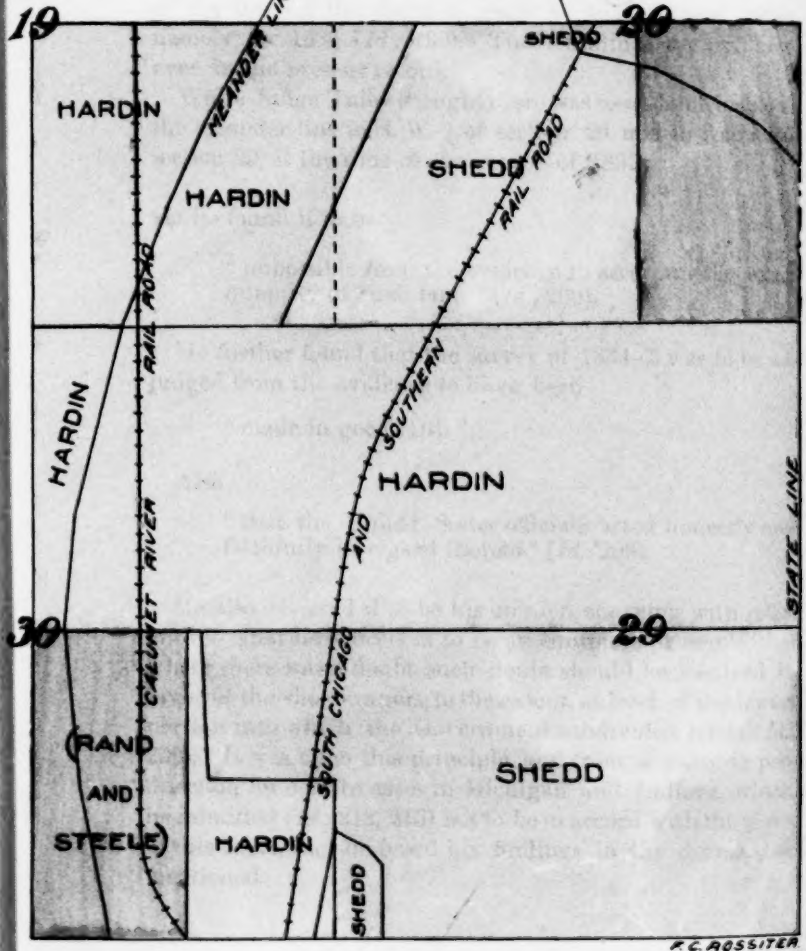
Also

> " that the United States officials acted honestly and faithfully in regard thereto " (*Id.*, 200).

He also declared it to be his opinion, speaking with reference to what he conceived to be an equitable principle, that where there was a doubt such doubt should be resolved in favor of the shore-owners, to the extent, at least, of the lowest portion into which the Government subdivided lands (*Id.*, 200). It was upon this principle, and from a seeming predilection for certain cases in Michigan and Indiana, which he admitted (*Id.*, 212, 213) not to be in accord with the views of this court, that he based his findings in the decree just mentioned.

MAP

SHOWING APPROXIMATELY THE
LINES OF DIVISION OF LAKE BED UNDER
THE DECREE OF AUG. 10, 1892.



The map shown herein represents approximately the lines of division under that decree. We say "approximately," because the diagonal line between the pink and the buff parcels in sections 19 and 20 were to be fixed by survey or measurement, it being intended to divide the bay by running a line half way between the meander line in section 19 on the west and S. W. fractional ¼ of section 20, when so extended southward as to give its eastern line the full length of a regular quarter section, making an equal division of that part of the bay. Approximate is also the appropriate word as to the division line drawn between the pink and buff in section 30, as showing the division of the bay upon that part of the plat, the true line intended being subject to survey or measurement in making a division. Nor does this plat represent separately the strip of 400 feet in breadth, north and south, on the south side of sections 19 and 20, then awarded up to such dividing line to the Cook County Canal and Dock Co. The plat is intended to represent approximately the general lines of division as between defendant in error Shedd, on one hand, and the plaintiffs in error, on the other hand, by the decree first rendered, the tracts of the plaintiffs in error being combined as all one and the same.

In speaking above of the admissions upon the pleadings we should also have noted that those admissions applied measurably to the allegations of plaintiffs in error as to stages of water under which any supposed spurs or promontories would be submerged (Record, 25). As to fractional section 29, as well as with reference to fractional S. W. ¼ of section 20, it was alleged that if an area could be supposed to have been unsubmerged at times, yet it was entirely insufficient to warrant the cost of meandering and estimating it at the price of Government land, namely, $1.25 per acre (Record, 26), and this is one of the allegations admitted (Record, 50). The intermediate space was also alleged to be thoroughly saturated with water, marshy and utterly

unfit for cultivation, and subject to continuous overflow (Record, 25, 26); also it was averred that when such intermediate space was partly unsubmerged it took the form of islands (Record, 27).

Two of such islands are recognized in the final decree (Record, 447). The 67th paragraph of that decree says:

> "In the marshy depressions" between points of extension from the north and south respectively "into the lake were two islands, one a mere knoll, the other containing about one or two acres, and on which trees and bushes grew" (*Id.*).

And quite inconsistently with the general theory of giving accretions, the court, on that supposed state of facts, decreed that those

> "islands passed under said patent of fractional section 29 to the grantee therein, and had vested in petitioner Shedd" (*Id.*).

In what has been said above, it has not been intended to supersede or weaken the force of the suggestions made in the original brief of the plaintiffs in error (pp. 150–186), although a part of the matter contained therein has been herein reiterated or, in a measure, restated. It has been more especially the purpose of these suggestions to save an unnecessary consumption of time in oral argument.

It seems to be proper to add in this connection that the claim by the plaintiffs in error of extension of the patented tracts over a proportionate share of the lake to the center has been constantly made by them in all parts of the litigation.

It was made by the pleadings prior to the decision of this court in *Hardin vs. Jordan*, 140 U. S., 371, and was repeated thereafter in language similar to that of this court.

It will be borne in mind that this court there said:

> "It has been the practice of the Government from its origin in disposing of the public lands to measure

> the price to be paid for them by the quantity of upland granted, no charge being made for the lands in the bed of the stream, or other body of water. * * * The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title in the grantee to such meander lines." * * *

In affirming the second or last decree the supreme court of the State approved of such definition of the object and character of the meander; for in that decree, which the court approved (Record, 487) as being in conformity with the instructions given in its former opinion, it was expressly declared that the meander was—

> " for the purpose of ascertaining the quantity of upland of the surrounding tracts to be charged for to the respective purchasers, and not for the purpose of limiting the respective grants and conveyances to such purchasers to the meander lines (so called) of said survey; the waters of the lake constituting and being the boundaries of such grants " (Record, 439).

The constant claim of the plaintiffs in error from the beginning has been that the patents gave them not only, as the supreme court of Illinois would allow, a mere riparian right or privilege, but such proprietary right or interest as the United States had in respect to the submerged land or body of the lake itself at the time of the original survey; the respective patentees taking proportionately to frontage on the lake according to the plat of the survey. This claim was stated over and over again in the pleadings (Record, 15, 17, 18, 19, 20). It was made in the case of *Hardin vs. Jordan, supra*, a transcript of the judgment in which by the circuit court of the United States for the northern district of Illinois after the remand from this court was offered and received in evidence by the circuit court of Cook county (Record, 251). It was also made in

the offer of the transcript of the judgment of the United States circuit court finally rendered in the same case (Record, 433). It was by the supreme court of the State, in its opinion by Mr. Justice Phillips, recognized as a claim made both by the plaintiffs in error and the defendant in error (Record, 481). It was made again in the assignment of errors, when the case had to be taken to the supreme court of the State by the plaintiffs in error, it being alleged therein—

> "that the court erred in holding that the title to any of the lands, whether submerged or unsubmerged, was in the State of Illinois, and in refusing to give due effect to the patents through which appellants respectively deraigned title" (Record, 454).

That the survey of 1834–'5 was accurate, and therefore that the plat under which the respective grants were made should govern, appears, among other things, from the fact that all section lines were run to the lake, and that corners thereof were established at the margin of the lake (Record, 312); also from the fact that the half-section lines, which, of course, were projected in the General Land Office in the making of the plat, were found from the evidence to have reached the lake (Record, 311, 312). This would go to show that the contours of fractional section 29 and of fractional S. W. ¼ of section 20 were correctly represented on the plat. This would appear also from observing the evidence as to elevations shown on Shedd's Exhibit C (Record, 91). Comparatively few figures of elevations between the meander line on the north and the east portion of the S. E. ¼ of section 30 or fractional section 29 (the latter tracts having the same extension northward to the lake in the Government survey) show elevations which would not have been covered at stages of water shown even in the later years to have been somewhat frequent.

The defendant in error took pains in introducing testi-

mony to show the supposed area on the 26th of February, 1883, of the land which the surveyor, Mr. F. C. Rossiter, thought to attach to or be connected with S. W. fractional ¼ of section 20. Such surveyor spoke of land projecting from the original 4.53 acres in the way of tongues. In one of these he said there were 4½ acres, and in the other one 10.26 acres, the 4½ acres being in the W. tongue, or supposed ridge, and the 10.26 acres in the E. one (Record, 370). But the surveyor also testified that in an examination made by him November 14, 1891, he found a depression or break in the ridge a few hundred feet south of Smale's house (Record, 369). (This is shown as the Condit house, Record, 173.) In explaining about such depression, the surveyor said that a corduroy road had been made there prior to the date last mentioned, at the east end of the depression; and he gave the elevations on the corduroy road at 2.49 and north of the corduroy road 2.3, and on the corduroy road 2.34 above datum; and as to

> "the general course of the depression there through that ridge,"

he said:

> "The direction is nearly north and south, bearing a little to the southwest and northeast."

He also answered that water at about 2½ feet would pass through there (Record, 370). The same witness said that in his survey of February 26, 1883, there was water in this natural depression (Record, 370, 371). These accounts from the surveyor called by Mr. Shedd in this regard were confirmed by Mr. Shedd in his own testimony, in which he entered into somewhat further particulars (Record, 72, 73). He explained, with reference to map "C" (Record, 91), the location of the natural depression. He did not claim that fractional section 29 extended much more than 600 or 800 feet

north of the south line of the section; *thus confirming the correctness of the original survey* (Record, 73).

He said in respect to the ridge, speaking of the time when he first saw the land, that—

> "In extreme high water I think that about all of that ridge would be covered by water. I have seen water there so high that I think very little of it would show out of the water. * * * I did not go on it at that time. I don't think it would have been possible to get there except by boat, but in ordinary stages of high water I should say that the whitest portion as indicated on the map (Shedd's Exhibit C, Record, 91) was probably above water" (Record, 73).

He was evidently here speaking of his early acquaintance with the property.

III.

THE SUGGESTIONS BY THE SUPREME COURT OF THE STATE SUPPOSED TO BE SUBJECT TO BE TREATED AS FINDINGS ANSWER THEMSELVES AS NOT BEING REALLY INDICATIVE OF THE STATE OF THINGS AT THE TIME OF THE ORIGINAL SURVEY.

In the opinion by Mr. Justice Phillips there is a statement that—

> "At different seasons of the year, as early as 1841, the ridge was often above the level of the lake, and in the course of a few years the ridge materially increased in width and was above the level of the water at ordinary stages" (Record, 464).

This was in recognition of the fact that there had been a change of conditions. The learned justice also said that—

> "between fractional section 29 and fractional S. W. ¼ of section 20 owned by Shedd, as shown by the evidence, there existed at the time of the original survey *a ridge which was but slightly covered by water*, and at several points along this ridge islets existed, one having trees thereon" (Record, 464).

IV.

LOOKING TO THE PATENTS, THE PLAT, THE ADMISSIONS UPON THE PLEADINGS, AND THE EXPLANATIONS GIVEN BY HIS HONOR MR. JUSTICE PHILLIPS, THIS COURT WILL BE AT LIBERTY TO CORRECT THE ERRORS OF FACT ARISING FROM THE DISREGARD BY THE STATE COURT OF THE ASSERTED RIGHTS OF THE PLAINTIFFS IN ERROR IN RESPECT TO WHAT WAS CONNECTED WITH, AND A PART OF, THE PATENTED TRACTS.

The findings in the first decree, although intended in the main to conform to the opinions of this court, in *Hardin vs. Jordan* and *Mitchell vs. Smale, supra*, did not actually carry out the law laid down by this court, and hence they should not stand.

There is a strangeness, a singularity almost inexplicable, in the position of the supreme court of Illinois. From *Middleton vs. Pritchard*, 3 Scam., 510, and *Canal Trustees vs. Haven*, 5 Gilman, 548, down to this day that court has, without variableness or shadow of turning, stated correct views of the purpose of a meander of a body of water except in the present instance, and correct views as to the effect of a deed conveying property on a highway or a body of water in which the grantor has had ownership. As to the title to land under its great rivers, which are of vastly greater consequence than any or all of its inland non-navigable lakes, it has adhered to the common law, resigning to private ownership the soil of the Mississippi, the Illinois, the Calumet, the Chicago, and other meandered rivers, and has deemed that to be the best policy, as the court has sometimes directly stated, as in *Braxon vs. Bressler*, 64 Ill., 488, as an example, and this although the neighboring State of Iowa has adopted and adhered to a different principle as to navigable rivers. The policy of the State under the grant to it of swamp and overflowed lands was distinctly to turn them over to private

ownership through sales by the respective counties, and this would have disposed of the bed of this comparatively insignificant lake if the claim thereto by the State, as made after the survey of 1874, had prevailed; yet all at once, without any intervention herein by the State itself, the court signified "that the policy of the State in recent years has been to stock its waters, both lakes and streams, with fish" (Record, 478), and then, reluctating (!) against any prospect of "small non-navigable lakes" becoming private waters (*Id.*), the court expressed itself to the effect that it had laid down a reasonable rule in *Trustees of Schools vs. Schroll*, 120 Ill., 509, not stopping to consider that while such waters were private and a part of the public domain, it was for the General Government and not for the State to lay down in regard thereto any such rule; nor staying to consider whether it would be conscientious for the State to claim property never granted to it, nor whether this court had ever consented to yield its power to determine the effect of grants of the public domain under the acts of Congress, nor did the court stop to consider the fact, explicitly stated by this court, that *Trustees of Schools vs. Schroll, supra*, was anomalous and announced a doctrine not necessary to be decided or passed upon in the case.

The earlier cases of *Beckman vs. Kreamer*, 43 Ill., 447, and *Bristol vs. County of Carroll*, 95 Ill., 84, recognized the principle that inland non-navigable lakes were on the same footing in respect to the construction of deeds conveying lands bounded thereby that has always been applied as to rivers in Illinois, and can be construed as proclaiming the law on the subject with more significance than can rightfully be asserted in regard to *Trustees of Schools vs. Schroll, supra*.

Respectfully submitted.

THOMAS DENT,
For Plaintiffs in Error.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1902.

No. 56.

GERTRUDE H. HARDIN and THE COOK COUNTY CANAL AND DOCK COMPANY, *Plaintiffs in Error,*

vs.

CHARLES B. SHEDD.

In Error to the Supreme Court of the State of Illinois.

PETITION FOR REHEARING.

THOMAS DENT,
For Petitioners.

BARNARD & MILLER PRINT CHICAGO

IN THE

Supreme Court of the United States.

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vs.
CHARLES B. SHEDD, *Defendant in Error.*

In Error to the Supreme Court of the State of Illinois.

PETITION FOR REHEARING.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The plaintiffs in error respectfully apply for a rehearing herein, and as grounds therefor state the following:

Full and absolute proprietary title was in the United states, without any distinction, so far as the title was concerned, between the land next to the water and the land submerged with water.

Such title was subject to the power of Congress alone.

Gibson v. *Chauteau,* 13 Wal., 92.

Being full and absolute, it was not subject to qualification by the State of Illinois, nor by any decision of the courts of that state.

Where patents making no exception or reservation were granted by the United States it was not within the power of the state, nor of the state court, to ingraft therein, by construction or otherwise, any such exception or reservation, nor indeed any qualification.

The United States alone, in the exercise of the powers conferred by Congress, could give title, and the exercise of the power to do so was exclusively a Federal power.

Irvine v. *Marshall*, 20 How., 558.

When the question arose whether the title to the lake bed once fully belonging to the United States had passed that question was to be resolved by the laws of the United States.

Wilcox v. *Jackson* (*or McConnell*), 13 Pet., 498.

Paige v. *Peters*, 70 Wis., 178, 182.

In construing patents from the United States, or determining as to the effect of the same, this court is the higher and ultimate authority.

Gilmore v. *Sapp*, 100 Ill., 297, 303.

The closing remarks of Mr. Justice CATRON, in speaking for the court in *Jourdan* v. *Barrett*, 4 How., 169, 185, at the close of the opinion, are eminently fitting, as applicable to this subject, and it is hoped they will be observed in this connection without further citation.

And this court has a revisory power when a claim of title is made under such patents, and is denied by a state court; and such revisory power cannot be taken away nor be qualified by the state court nor by any of its decisions.

The lake bed could not pass except by the patents, and did not pass by the Swamp Land Act.

The inaccuracy of using the words "Navigable Lake" on the plat could be shown, and was shown most conclusively in the litigation. It is throughout recognized as a misnomer or mistake, and no consequence adverse to the rights of the undersigned can justly be assigned to such mistake.

Hardin v. *Jordan, supra.*

Stringer v. *Lessee of Young*, 3 Pet., 320; s. c., 7 Law Ed., 693.

I.

A title was set up by the plaintiffs in error under patents from the United States, as embracing submerged lands or a part of the lake bed of a non-navigable lake bounding the lands patented. Such title was denied by the state court, and the patents were construed as giving title only to the water's edge of the lake, and not as including land under the water; this being by such court claimed for the state. This court now says that the state court having so pronounced itself, though somewhat timidly, and guardedly in this case, yet more distinctly in the later case of *Hammond* v. *Shepard*, 186 Ill., 235, "the law of Illinois" has been thus settled. Such conclusion is grounded upon a theory as to the potency of "state law" which "has become established almost without argument."

But was it within the province and unreviewable power of the state court thus to make the law to govern the patents from the United States?

Before answering this question the course of proceeding, as bearing on the question what authority, as between the courts, is the higher, as having the ultimate right of final decision, may be recalled.

The holding of the state court was based on the ground that the lake was a meandered lake, that is to say, that it was meandered in the public surveys under which the title was to pass from the United States. The court did not hold that the meander of the lake, as a line which in surveying was run from point to point, and might be surveyed again, constituted in itself a boundary. The court could not do so consistently with its prior rulings. It was found, as has always been found in every instance of investigation, that the body of water included within the survey of the township was a lake which was in fact non-navigable. (161 Ill., 473.) The question what was the common law doctrine in such cases was admitted by the state court to be a proper, and, indeed, the controlling question, and, coming to that point, the court inquired whether the rule in respect to boundaries should be held to be similar in the case of lands on a non-navigable lake to what the court itself had held it would be in the case of even a meandered river as a boundary; and in this particular the court, in its opinion by Mr. Justice Phillips, resolved that it would determine for itself that the common law on the subject had, as to lakes in Illinois as contradistinguished from rivers, been properly announced in *Trustees of Schools* v. *Schroll*, 120 Ill., 509. And, therefore, the court chose to say that, as to all meandered lakes alike, whether large or small, placing the same on the same footing as Lake Michigan, it would adhere to an expression made in the case last mentioned, notwithstanding the decisions of this court to the contrary in *Hardin* v. *Jordan*, 140 U. S., 371, and *Mitchell* v. *Smale*, 140 U. S., 406, upon the identical question and in regard to the same lake of which in particular the Supreme Court of the state was speaking.

This court, it should be especially observed, had particularly considered what was the common law in respect to a non-navigable lake meandered in the public surveys. The Supreme Court of the state had not considered it in the case of *Trustees of Schools* v. *Schroll, supra,* as to a patent from the United States, and was not actually called upon to consider it there.

But, as before remarked, the Supreme Court of the state, in the present case, took the position that it was authorized to determine conclusively as against patentees from the United States the construction which should be put upon the patents in respect to lands bounded by lakes, not only those which were navigable, but also as to all meandered lakes, "regardless of the question whether or not they were navigable"; the court further holding that "so long as such meandered lakes exist, over their waters and bed when covered with water, the state exercises control, and holds the same in trust for all the people, who alike have benefit thereof in fishing, boating and the like." (161 Ill., 493.)

These citations from the opinion in the state court in this case are repeated to the end that the fact may be kept in view that the court denied title or proprietary right in the patentees as to the lake, notwithstanding it was conceded that the lake was the property of the United States when it sold and conveyed the lands bordering thereon *without any reservation of the lake,* and notwithstanding the fact that the state could not claim title by way of sovereignty.

The ultimate holding of the court as to the title to the lake being in the state was expressly put on the ground of the policy of the state, especially in later years, a policy which it was thought would be subserved better by not

giving over to the proprietors anything from meandered lakes, small or large, except accretions, as a recognition, not of title, but of a riparian interest in the body of water constituting the boundary. The view of the state court as to the common law will, however, be presently noted further. But on that subject, "Policy," it would seem, suggested itself to the state court as bearing on its right to say whether the common law was, as this court had found it to be, in harmony with the practice which had always prevailed under patents from the United States for land bounded by non-navigable waters within the public domain in not charging for the submerged land, but treating the body of water as a boundary.

This court now declares that in *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, *supra*, this court ascertained "what the local law was," and decided "that the abutting lot owners took to the center of the lake." But this court chooses to put aside that ascertainment, and consequent judgment, and, instead of abiding thereby, to turn to and accept as the unquestionable law of the case the opinion of the Supreme Court of the state in the present case, as construed, it may be, by the later case of *Hammond* v. *Shepard*, *supra*. Looking, therefore, to these decisions of the state court as a higher and better determination of the local law than previously existed, either before or after the decision of this court in *Hardin* v. *Jordan*, this court finds that under such decisions of the state court, adverse in this regard to the decisions of this court, the patents from the United States describing certain tracts bounded on a non-navigable lake, "do not carry adjoining land below the water line." (Opinion by Mr. Justice Holmes, p. 2.)

According to such ruling the effect of the patents "to

private persons" is, as is stated in the dissenting opinion of Mr. Justice White (p. 1), "to transfer the title of the bed of the lake to the State of Illinois."

This court, according to its present opinion, makes no question as to which court, whether this or the state court, has a prerogative right to construe the patents, but only looks to the question what was meant by the Supreme Court of the state in the opinion in the present case, and in the later case of *Hammond* v. *Shepard, supra.* Reading the two cases together, this court concludes that it has been made "clear * * * that conveyances of the upland do not carry adjoining land below the water line." The court follows these decisions because it is said, "it has become established, *almost without argument,* that the effect of a grant from the United States on the title to adjoining submerged land will be determined by the law of the state where the land lies."

In the opinion of the court by Mr. Justice Holmes (p. 2), as applied to lands under navigable water, the proprietary right of a state in its sovereign capacity is recognized as something distinct from the principles governing this case; and it is said, "as to conveyances bounded by non-navigable lakes," it is not meant that the land under such water also "passed to the state on its admission or otherwise, apart from the Swamp aLnd Act, but (the doctrine accepted as the local law in this case) "is simply a convenient, possibly the most convenient, way of determining the effect of a grant."

What does this mean but that the state court could be its chooser, and whatever interest, even of a proprietary character, it should claim for the state would be yielded to it by this court?

The incongruity of holding that a government patent

granting a tract of land bounded by non-navigable water should be construed as conveying to the patentee upland, while it conveys to the state the water and submerged bed, if the state chooses to take that position, is supposed to be avoided, if we understand the position of the court, by deciding that it is convenient to determine that this is the effect of the grant.

If your Honors please, may we pause for a moment to consider what is said to have become established "almost without argument"?

One thing thus allowed so readily, and as if without any challenge, is, that each state may take all non-navigable lakes within its boundaries as soon as the lands abutting thereon are conveyed by the United States to private owners. The decision of the State Court refers to meandered lakes, but actually applies to most lakes as soon as surveyed or meandered. What is this but declaring that the patents can, as to the lands submerged by such bodies of water, be construed conclusively by the state courts without any revisory power being left to this court? Is it really different from holding that, as to all patents granting lands bounded by such bodies of water, the courts of any state in which such bodies are can freely and absolutely determine that such bodies of water belong to the state? Or, again, what is it but to decide, as before suggested, that a patent shall have the double construction, *if the state court so chooses,* of giving to the grantee named therein upland, but giving to the state the body of water referred to as a boundary, with the bed thereof? The admission that it belonged to the United States and might be sectionized and sold is given away by the construction allowed to the state court, of determining of

its own volition, that the state takes it independently of any grant to itself. Is it a good answer to say, in reference to such a surrender of property and prerogative to the states, respectively, that "the United States assumes the position of a private owner, subject to the general law of the state so far as its conveyances are concerned"? The conclusion certainly is that whatever the state court chose to determine was and is the positive and unquestionable law; this court not only accepting the determination of the state courts, but surrendering all controlling thought or power, except to see that the state court did, for some reason or other, or with reference to an arbitrary power on its part, so declare or determine.

It is equivalent to a declaration that no federal question can arise if a state court, construing a government patent for land bounded by water, chooses to construe such patent as giving upland only to the patentee, but to the state a proprietary right to the land under the water. It is likewise a declaration that the state is free to take the property of the United States, or grantee of the same, by way of construing a land patent to a private individual, and that this court is powerless to prevent such a consummation.

It is to be premised, and will doubtless be conceded, that, aside from public or navigable bodies of water, title to real estate in the former Northwest Territory must be traced from the United States, and that this must be by Congressional grant or patents issued in pursuance of the acts of Congress, and not from the acts of government surveyors or other officials not authorized to issue patents. (*State of Iowa* v. *Rood*, —— U. S., ——. Opinion filed Nov. 18, 1902.)

Although the writ of error in the case last mentioned

was dismissed on a question of jurisdiction, the enlightened judge who declared the judgment of this court truly distinguished between questions of title by virtue of sovereignty of the state and title deducible from government sales and grants, and held that what was shown to have been done by surveying and meandering the lake, and in the approval by the Commissioner of the General Land Office of such survey of the lake, including the meander thereof, could not be said to segregate such lake, nor transfer that part of the public domain to the state.

The paramount power, and consequent duty of this court, to be guided by the laws of the United States, and not by any state court decision in determining as to land titles proceeding from the United States, were recognized in that case.

II.

It is to be noticed that the decision of this court in *Hardin* v. *Jordan*, followed by *Mitchell* v. *Smale*, was expressly an exposition of the common law.

The court, by Mr. Justice Bradley, declared that the common law "is the true and only law of Illinois on the subject of land titles, and especially as to the rights of the riparian owners and the construction of deeds and grants of land bounded by streams and permanent bodies of water, except the great navigable lakes." (384-6.) The court had quoted from a leading Illinois case a statement declaring: "We feel bound * * * so to construe grants by the government according to the principles of the common law, unless the government has done some act to qualify or exclude the right." (*Hardin* v. *Jordan*, 140 U. S., 384-6, at p. 384.)

In the argument at the bar it was assumed that this case was governed by the common law; and, on the part of the undersigned, it was thought to be unnecessary to reargue the matter when it had been so well and vigorously maintained and expounded by this court in *Hardin* v. *Jordan*. It was considered to be enough, in that regard, to specify some additional authorities expository of the common law doctrine, and, while distinguishing between navigable and non-navigable waters, to show the approval by the state court itself of the legal position that the meander line (so called) was not a boundary. (Rec., 439.) But authorities from various sources were cited to show, as per example at pages 99-103 of the first or principal brief for the plaintiffs in error, that, as was stated by Mr. Justice Gray in *Paine* v. *Woods*, 108 Mass., 160-169, "*the general rule of construction of all grants of land bounded by water of any kind is now well established, that, unless qualified by restrictive words, they pass the soil towards the center of the water* as far as the grantor owns." Nor were such pertinent authorities in this line of decision as *Middleton* v. *Pritchard*, 3 Scam., 510; S. C., 38 Am. Dec., 113; *Canal Trustees* v. *Haven*, 5 Gilman, 548; 3 Kent's Com., *428; Elphinstone on Deeds, *182-3; *Shell* v. *Matteson*, 81 Minn., 38; S. C., 83 N. W., 491—a case as to a lake east of the Mississippi, and, therefore, in the former Northwest Territory—omitted in the references.

The expression, "the law of the state in which the lands lie," in view of the use, not now made of it, as being, like the law of the Medes and Persians, unrepealable, was, to say the least of it, unfortunate. It was inapplicable to any patent for public lands further than it might be applied in respect to boundaries in the case of navigable waters,

as applying to ownership as between the state and private individuals of the beds thereof, or might refer to cases where the state was the primary source of title, or made the particular grant construed. In cases concerning government grants, or patents for a part of the public domain, in a region governed by the common law, and embracing non-navigable waters bounding the patented tracts, the true and only question was and is as to the bearing thereon of the common law, or whether an exception has been made in the grant itself, *or by the proper legislative authority having the right to fix at the time of ownership of the property a special status of the same to govern and be considered in the construction of a grant.*

It was the question what was the common law which was argued in *Hardin* v. *Jordan*. Although the court did not deem it necessary to go back of the Statute of Illinois of February 4, 1819 (Revised Code of Illinois, 1829, p. 102), adopting the common law, yet in point of fact Mr. Justice Bradley, in delivering the opinion of the court, referred to the earlier Statute of Virginia, to the same effect, which statute applied to that state and all its outlying territory northwest of the river Ohio. Such Statute of Virginia is cited in *Scott* v. *Lunt's Administrator*, 7th Peters, 596-605. Hence, the true question was how the patents should be construed according to the common law, which was the law in this regard in the whole territory which was ceded by Virginia to the United States; and it was to this question that this court, speaking by Mr. Justice Bradley, addressed itself in determining what was the law of the case, which, however, was but incidentally spoken of as "the local law of the State of Illinois."

It must be evident that the investigation had reference

to the ascertainment of the common law, and not to the question whether any law of the State of Illinois could operate upon or affect the construction of the patent.

It has been entirely appropriate in various instances to refer to "the law of the state where the land lies," and make that law the controlling factor in the construction of conveyances. Such was the case in "*Shively* v. *Bowlby*, 152 U. S., 1, 45; *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S., 87, 90, 93; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S., 349, 363," referred to in the opinion in this case, since those cases concerned navigable waters. The expression was appropriate, also, in various other cases pertaining to navigable waters. But it was not a fortunate expression in instances relative to non-navigable waters, in respect to which grants from the United States of territory controlled by the common law are or have been the subject of construction; not fortunate, in that it might be *misapplied* as authorizing the overruling of the common law if a state court, actuated by state pride or supposed policy, should choose to adopt an unfortunate expression of its own, made without regard to the common law, and entirely ignoring the common law. Such expression, first made without argument, even if appropriate in the first case of its use, would thus be made an excuse for adhering to an erroneous suggestion, which again would be followed without specially considering its reasonableness; an error perpetuating error.

There are various other cases in which the expression was and is quite appropriate; such cases, for example, as pertain to grants from the older states from which primary titles proceeded. This also may be said, in various instances, as to the construction of grants from the states

based on titles from the states as owners under grants of school lands or patents for swamp lands. Each state may, in most instances determine through its courts the construction of grants not proceeding from the United States; and, generally speaking, the decisions of the state courts in such instances will not be reviewable here, because of not presenting any federal question. In point of fact, this seems to have been the character of *Trustees of Schools* v. *Schroll*, 120 Ill., 509; for in that case the trustees of schools had made a plat of Section 16, and the question was raised as to how the deed or conveyance of lots *represented on that plat* should, *if the lots conveyed had appeared to be bounded by a lake*, be construed. No federal question was involved; and the court did not find that the grant by the state was of land bordering on the lake, which lake had passed to the State of Illinois, by the Enabling Act, and was subject to be granted by the state, or *trustees of schools*, as representatives thereof.

It is intended herein to submit to your Honors the proposition that the common law prevailed in respect to the grants from the United States under consideration, and that no mistake in this regard was heretofore made by this court in so holding. It is also intended to say that even a statute of the state, if there were any such, could not control in the construction of the patents from the government, and, moreover, that the state court could not itself make any law to govern in such construction.

It is not forgotten that upon the question what is the common law, "decisions of the courts of justice contained in * * * the reports of Judicial Decisions," and also treatises of learned men expository of the decisions, should have weight or authority; but it is respectfully maintained that this court had at the time of the decision

of *Hardin* v. *Jordan*, and still has, a paramount right to construe and determine the effect of the grants under consideration, and that no expression made here or elsewhere as to the "law of the state" should have the effect of rendering the decision of this court inoperative, or of taking away its force.

Besides this, neither the courts in Illinois, nor in any of the states wherein the common law prevailed over territory belonging to the United States, could change that law so as to affect or qualify a grant from the United States. In all such states "a grant of public land of the United States carries with it the common law rights to an innavigable stream thereon (and we may add, a non-navigable body of water referred to as a boundary), unless the waters are expressly or impliedly reserved by the terms of the patents or of the statute granting the land, or unless they are reserved by the Congressional legislation authorizing the patent or other muniment of title." (*Lux* v. *Haggin*, 69 Cal., 255; S. C., 10 Pac. Rep., 751.) "Neither the state Legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United States, nor to detract from the estates in such lands granted under the laws of the United States." (*Id.*, 10 Pac. Rep., 745.)

The latter proposition is but in accord with the provision in the Ordinance of 1787, declaring that "the Legislatures of the districts, or in states which might be formed out of (the territory of the United States northwest of the river Ohio) should never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress might find necessary for securing the title in such soil to the *bona fide* purchasers." (Art. IV. of said

Ordinance.) This restraint was generally laid on the new states in the several enabling acts providing for their admission into the Union.

The common law prevailed in the territory before the cession was made by Virginia, and thereafter continued to prevail in respect to the whole territory while in the hands of the United States, and consequently as to the titles given by the United States, and it should always be maintained, unless in any instance qualified by the grants or patents. To this statement is to be added the observation that there is a branch of the common law that for the most part settles the manner and form of acquiring and transferring property. (1st Bl. Com., 67.) Or, as stated by another author, the common law in one of its branches "declares the principles applicable to the expounding of wills, deeds and acts of parliament." (Broom's Commentaries on Common Law, *8.)

The anomaly of disregard by the Supreme Court of the state, not only of the decisions of this court on the precise question, but also of the decisions in England, Ohio, Michigan, Indiana and Minnesota, as well as in New York, New Jersey and other states, in reference to the common law, is startling, and should not receive encouragement.

A departure from the common law in the manner indicated will doubtless be rife with fresh and almost unending litigation, and work incalculable damage.

It will, of course, be remembered that in *Hardin* v. *Jordan* it was appropriate enough to discuss the Illinois cases supposed to be based upon the common law, and especially cases where bodies of water bounded tracts meandered in the public surveys; but no concession

that the state court could itself, and contrary to the weight of authority, make the law, can fairly be deduced from such discussion or use of cases.

It should not be overlooked that not only did the state court, in *Trustees of Schools* v. *Schroll*, make observations not necessary to the judgment, in disregard of its earlier expressions on the subject, some of which were cited in *Hardin* v. *Jordan*, but also that the state court now, in choosing to adhere to such observations, plants itself upon a theory that ignores or obliterates the distinction between navigable and non-navigable waters, and attributes to the meander of the lake an effect which could not, under the law as laid down by itself, nor under the law as repeatedly laid down by this court, be given to it. Nor should it be forgotten that the state court conceded that "the question * * * as to private rights must be determined by settling the rights of the parties under the patents issued on the two surveys" (161 Ill., 492), referring to the original survey of 1834-5, and to the survey of the lake bed in 1874. Nor should the fact be overlooked that the state court did not in any way show how title to any part of the property could pass to the State of Illinois, but conceded preliminarily that it did not pass by the Swamp Land Act, and that the adjudication to that effect as against the state and as against the County of Cook by the Land Department, was and remained binding (*Id.*, 490-492), all going to show that the State of Illinois could only have taken title, if any, by virtue of a grant from the United States. Other or further than this, the sole consideration upon which the court proceeded was that it found a body of water which was meandered in the public survey.

Thus, in considering whether the state took title, nothing whatever was presented as argument or suggestion in support of any grant to the state, unless we be required to accept some supposition to that effect from the fact that the court *assumed the right to treat the lake as a public or navigable body of water because it was meandered*, giving the same effect to the meandering of the lake that would have followed from an act of Congress declaring that every meandered lake should be held to be a navigable body of water, a declaration that would have been repudiated by Congress.

Neither will it be forgotten that if the decision of the state court in this regard be permitted to stand, the state has been made the final judge, through that tribunal, not only of the supposed matter of policy, but in a matter of title which is asserted for the state by the court itself.

While the Supreme Court of the state, speaking through Mr. Justice Phillips, intimated that in some cases in other states an opinion similar to a doctrine expressed in *Trustees of Schools* v. *Schroll* had been maintained without being predicated on the Colonial Ordinances of Massachusetts, and, therefore, might be said to be based on the principles of the common law, yet such cases will be found to be distinguishable from *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, as not being expressed to have reference to the common law, but in nearly, if not quite all instances, traceable to constructions of conveyances other than patents from the United States, and not presenting any federal question.

The central and pivotal feature of *Hardin* v. *Jordan* was the consideration of the common law, as governing the case, not, however, overlooking what had been the practice of the United States in the survey

and sales of the public lands, but, on the contrary, showing that such practice conformed to the general principles of the common law as to the constuction of deeds and grants for lands bounded by water, "no charge being made," under such practice from the origin of the government, "for the bed of the stream or other body of water," even when meandered (140 U. S., 371); the waters themselves, under such practice, having been considered to "constitute the real boundaries."

The dissent of the state court was not from denying that such had been the practice of the government, but in an assertion that the state court could itself, and in opposition to this court, declare what was the common law, on the supposition that the policy of the state would be promoted by adhering to a former expression of the same court on the subject. Hence, it may be said that the decision of the Supreme Court of the state did not assume to disregard the common law, but rather to make it for the case, as if it was something to put on or off, at will, "for convenience"; as to which see, in passing, the principal Brief for the plaintiffs in error herein, pages 103-104, 130-137.

III.

AS TO THE SWAMP-LAND GRANT, TO WHICH VARIOUS REFERENCES ARE MADE IN THE OPINION OF THIS COURT BY MR. JUSTICE HOLMES.

The opinion observes that the patent to Holbrook, embracing an important part of Mrs. Hardin's holdings was dated May 20, 1841, "long before the Swamp-Land Act." The opinion then states that, "at that time the land under the lake, as well as that surrounding it, be-

longed to the United States." The opinion thereupon holds that "if grants of the United States should be construed without regard to state laws, it may be assumed that, subject to all questions of the proper adjustment of lines, Hardin would have prevailed."

Pausing for a moment while mentally questioning what is meant by "state laws," a general disclaimer for the plaintiffs in error of any opposition to state laws must be interposed; and the counsel whose name is to appear as their representative would express the hope that the recording angel will not add to the many sins for which he must answer the charge of using the phrase, "the law of the state where the land lies," or other similar phrase, as furnishing the rule for construing patents from the United States for public lands in the former Northwest Territory.

But as it seems necessary to keep in mind other observations in the opinion by Mr. Justice HOLMES, referring to the Swamp-Land Act, the two later passages making such reference will, for convenience, be herein quoted:

> "The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passed to the state on its admission or otherwise, apart from the Swamp-Land Act, but is simply a convenient, possibly the most covenient, way of determining the effect of a grant." * * * "Of course, it would result from the Illinois ruling (referring to the decision in this case and in *Hammond* v. *Shepard*), that the survey of the submerged land in 1874, referred to in *Hardin* v. *Jordan*, and the conveyances in pursuance of it, may have been good on the Illinois side of the state line, unless the State had got a title before that date under the Swamp-Land Act."

Confining observation for the present to the legal situation of the lake with reference to the Swamp-Land Act, it is to be remarked that although the opinion by Mr. Justice Holmes added to the latter quotation a statement that, "it is unnecessary to consider in this case" whether the state did get a title under the Swamp-Land Act before the survey of the lake in 1874, yet the various allusions to the Swamp-Land Act, as well as to the survey of 1874, as indicating a possibility of vital force in one or both of them, as calculated to affect the rights of the plaintiffs in error, should not remain unnoticed. They are in every point of view of great significance.

Is it not enough in respect to the survey of 1874, to find that the Supreme Court of Illinois in the present case agreed perfectly with this court that such survey was null and void, and that the United States could not after having sold the lands bordering on the lake sectionize the lake and sell it over again? The difference between the Supreme Court of Illinois and this court, as this court will recall, had reference merely to the question whether the patentees from the United States of the lands bounded by the lake took full title to all the submerged land and had a right to portions of the lake subject to be specifically determined, according to well established rules, or took by virtue of the patents only riparian rights, giving them, as the Supreme Court of the state held, the land only to the water's edge, but a right to follow the water if it should recede; not the certain boundaries to which this court had declared them to be entitled, but merely a shifting or uncertain boundary.

But there cannot be a shadow of reason for supposing that the State of Illinois took title to the lake by virtue of the Swamp-Land Act.

The terms of the act itself, and all the circumstances applicable to the question, would fully negative any authority of the state to claim title to the lake under that act.

In the first place, some of the land which was situated on the lake had been sold by the United States before the passage of the act, a fact expressed in the opinion by Mr. Justice Holmes. Besides this, an act earlier than the Swamp-Land Act was passed by Congress, such earlier act being that of September 20, 1850, giving to the State of Illinois the right of way through that state for the construction of a railroad which was to run from Chicago, Illinois, to Mobile, Alabama, which railroad is now known as the Illinois Central Railroad. For the purpose of aiding in the making of the railroad and its branches, the act granted every alternate section of land designated by even numbers for six miles on each side of the road and branches, and further made provision that the uneven numbered sections or parts thereof not granted should not be sold for less than double the minimum price of the public lands, that is to say, for not less than $2.50 per acre. Under this act it may be observed by the court upon looking at the copy of the government plat inserted in the record between pages 60 and 61, all the parts of Sections 20 and 32 remaining unentered at the passage of the act were selected by the railroad company, the letters, "C. & M. R. R.," meaning the Chicago & Mobile Railroad, now the Illinois Central. The tract entered by Stephen A. Douglas May 8, 1855, and now held by defendant in error Shedd (see Rec., 59, as to Patent Certificate), was probably the only tract that remained subject to entry at the time of the passage of the Swamp-Land Act, the date of the entry by William B. Egan not appearing from the record in this case.

It is not improbable that after the passage of the act in aid of the railroad there was an order withdrawing from a right of selection under the Swamp-Land Act the land in this particular locality, the price of such other lands having been advanced by the Act of September 20, 1850. (There is hardly time in making the present writing to make search for such probable order.)

But there are still other reasons why the Swamp-Land Act would be out of consideration, either as a suggestion that some "legal subdivision" *might have been claimed thereunder*, or as a foundation for objection to the title of the plaintiffs in error. One such reason is that the Swamp-Land Act provided only for the selection of legal subdivisions, the "greater part" of which were of land "wet and unfit for cultivation." The act did not provide for the selection of lakes. As before remarked, it applied to "legal subdivisions," and contemplated action under surveys, which, in the main, had been made many years prior to the passage of the act. In the case of the fractional township under consideration, the survey of the township was completed as early as 1835. This is noted here because it would seem that some misapprehension has arisen in regard to the course pursued in disposing of the public lands. All the section lines were run to the lake, and corners to each fraction bordering the lake were established in making the survey, and the meander had reference only to the quantity of the fractional parts of sections or smaller legal subdivisions bordering on it. When the survey was made it was the custom of the government to have surveys made under contract to include a number of townships. (American Almanac 1832, 145-147, Article entitled, "Public Lands.")

After the survey of the township the surveyors returned to the Surveyor General the field notes of the survey of each township together with a plat, and from such field notes the Surveyor General tried the accuracy of the plat and made calculations of the quantity of land in the subdivisions. (*Id.*, 147.) A plat of each township was afterwards prepared by the Surveyor General, one copy of the same for his own office, one for the Register of the proper land office, and a third copy for the Commissioner of the General Land Office at Washington. At some time thereafter a public land sale occurred, and not until after that time were the lands subject to entry. A survey of the township was made once for all, unless found to be in need of correction, and as to this the government, like any proprietor, could make corrections before selling the land, and could re-sectionize parts unsold if re-survey was deemed advisable.

These observations are made, not only to indicate that the survey of the township was complete in 1835, but also to distinguish this case from a contention that arose in some of the Indiana cases, including one as to Wolf Lake, recently decided. In some of those Indiana cases a debate sprang up as to whether there had been a complete survey of a township embracing a lake or lakes. The reason for the debate was, in the first instance, that when the State of Indiana took title to the lands bordering on Beaver Lake, under the Swamp-Land Act, some officials, as if acting under state law giving authority to sell the "Swamp and overflowed lands" then held by the state, conveyed to Dunn & Condit the lands bordering on the lake, describing them as in the patents to the state, and the grantee or grantees of Dunn & Condit then claimed the lake as well as the lands bordering on. it.

This appears in part from *State of Indiana* v. *Milk,* 11 Bissell, 197, which, however, went no farther than a decision by Judge Gresham upon a demurrer to the answer, and was afterwards dismissed without a hearing. But the facts appear more at large in *State of Indiana* v. *Portsmouth Savings Bank,* 106 Ind., 435, where the matter was finally determined. There it appeared, in substance, that the sale to Dunn & Condit was of none other than the upland as measured or estimated under the original government survey; and it was held that the lake did not pass by the conveyance executed by the state or county official to Dunn & Condit, because a survey by the state after acquiring title under the Swamp-Land Act was necessary before selling. Upland, as well as lake, was to be regarded as "swamp-land," yet no part that was formerly lake was to be sold until surveyed, and it was held that the purchasers were chargeable with notice of want of authority on the part of the representative of the state to convey the former lake bed that the *state* had not surveyed after acquiring title through the Swamp-Land Act. The state had taken title to the lake, at the date of that act "swamp and overflowed land," but the state took such title from the United States under the description of the legal subdivisions which had been made by the United States, it being found that the greater part of each of such "legal subdivisions" was "wet and unfit for cultivation"; the former lake thus passing to the state. Such construction, by which the former body of water passed through a conveyance particularly specifying the "legal subdivisions" surrounding it, represented, as we suppose, the practice of the government noted by Mr. Justice Bradley in *Hardin* v. *Jordan,* or, as we may say, and as was there held, being in conformity with the common law.

It is quite true that if the lands surrounding Wolf Lake in Illinois had been unsold by the government at the time of the passage of the Swamp-Land Act, and if the earlier act in aid of the railroad company had not been passed, and if the greater part of any legal subdivision was wet and unfit for cultivation, such legal subdivision might have been claimed by the state, and if listed as swamp land and conveyed by the United States to the state, the conveyance would have carried title to a proportionate part of the lake, and then it would have followed under the Act of Illinois of June 22, 1852, Session Laws of Illinois, 1852, page 178, that the whole, so far as passing to the state, would have been subject to be offered for sale by the County of Cook. But not a single one of the various contingencies necessary to the application of the Swamp-Land Act is believed to have existed so far as lands on the border of Wolf Lake in Illinois were concerned; and there is abundant evidence in this record of good reason for a rejection in the Land Office of the claim of the State and of the County of Cook as its guarantee under the Swamp-Land Act, so far as the submerged land in the former Wolf Lake is concerned. (Rec., 94-5.)

What is said in the opinion by Mr. Justice Holmes, as above quoted, in regard to a form of construction as being "simply a convenient, possibly the most convenient, way of determining the effect of a grant," indicates, it is to be feared, the thought that it was the right of the Supreme Court of the state to adopt a more convenient way of disposing of the principal question involved than was in the opinion of the court by Mr. Justice Bradley in *Hardin* v. *Jordan*, found to be the true legal way. Nor should it be forgotten that this court in the latter case

held that the course therein approved "has been the practice of the government from its origin in disposing of the public lands." (140 U. S., 380.) This matter of looking to mere "convenience," is as if the common law had nothing to do with construction of a patent in such case, or as if the State Court could at its own volition make the law, suiting the action to a word, or to words chosen once or oftener and thereafter followed as being the very substance of a rule "established almost without argument."

The argument *ab inconvenienti*, ought not to pass without such a challenge as may be read from the opinion by Mr. Justice Bradley, 140 U. S., 397-399. The expressions there made have a general pertinency, though there applied to a different proposition.

IV.

As to the words "Navigable Lake," on the plat.

It is remarked as to this in the opinion by Mr. Justice Holmes that the conveyance was by reference to the official plat, and that the plat of the Illinois portion, unlike that of a part in Indiana, described the lake as a "navigable lake." Also that, "It is true that this is a mistake, but it might be urged that the description must be taken to have the same effect as if it were true when we are determining the effect of a conveyance adopting it."

It certainly cannot be said that this matter was overlooked in *Hardin* v. *Jordan*, nor in the present case, reported as *Fuller* v. *Shedd*, and *Hardin* v. *Shedd*. The reports show quite to the reverse of any overlooking of this matter.

The government by the proper officers had admitted over and over again that it was not a navigable lake. The proceedings in 1874, that caused it to be surveyed, were wholly based on the idea that it was not only non-navigable, but that its waters had so receded and evaporated that the submerged lands had become fit for cultivation.

The words "Navigable Lake" on the plat, were not really a description of the lake, they stood merely in the place of a name for the time being, and it was competent to show that they were erroneous. It was about as clearly a mistake as if the surveyor or draftsman had written macadamized road or some similar phrase. The government was not bound by the words "Navigable Lake," any more than if some fanciful name had been used, and in point of fact, it fully discarded those words.

Nor did the State of Illinois claim the lake by virtue of sovereignty. Everybody conceded that the lake was non-navigable. Nobody claimed at that time that it was navigable when surveyed. As was remarked in *Hardin* v. *Jordan*, 140 U. S., 380, "the lake, * * * was marked with the words 'navigable lake,' although the fact found by the court is that the lake was not and is not a navigable lake, but a non-navigable fresh water lake or pond. The patent itself does not contain all the particulars of the survey, but the grant of the lands was recited to be according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General, thereby adopting the plat as a part of the instrument."

The words "Navigable Lake," having been inaccurate, the inaccuracy could be and was shown. It was an error

that was open to evidence. (*Stringer* v. *Lessee of Young*, 3 Peters, 320; *Hardin* v. *Jordan, supra.*)

If the government had made the lake *navigable,* it would have done a great favor. One of the plaintiffs in error thought of cutting a canal through it, but it is more fit for railroads than for a canal; two of such railroads crossing it, as the record shows. Before making sale of the subdivisions bordering the lake the United States could, undoubtedly, have sectionized and sold the portion that was originally a lake, and this because the lake was not navigable, but the United States did not choose to do so because such was not its policy, nor would such policy have harmonized with the more reasonable course which the government found to be necessary for the encouragment of settlements.

Nobody in the early times when this fractional township was surveyed, before the Indians had been fully removed from this section of Illinois, would have been willing to buy one of the small legal subdivisions, if limited to it without having any rights in respect to the lake. Anyone buying took title under the description of the legal subdivisions, as always in the government sales, unless otherwise provided; the government, however, making no charge for the land under the water. The grantee of the government took whatever the situation in fact entitled him to take; and if the state at that early time had wished to disturb him by making a claim of the lake, can there be any question that its claim would have failed, when predicated on the mistake of marking on the plat "Navigable Lake"? If claim by the state against the United States would have been unavailing, would it not be so as to a claim by the state against the grantee of the United States? Such grantee took all

the rights of the United States, whatever they were, in the property as including position on the lake, whatever it might be, and found the lake to be, as no doubt the government had found it to be, non-navigable.

There can be no suggestion from the field notes, or otherwise, that the surveyor so examined the lake hydrographically as to be authorized to call it "navigable," nor it is submitted, does it seem to be just to allow the case to be determined upon a mistake so palpable; a mistake which the decree justly nullified; a mistake, too, which has never been made the basis for a claim either by the State or the United States.

V.

Finally, while much more should have been said in fewer words, so, too, as to have woven into a narrative some points of history connected with the public land system under which Illinois as a part of the original north-west territory has grown, the occasion forbids extended argument. Yet no less can be said than that the principles involved are highly important. The case, to be sure, presents a question of title, the foundation of which ought to be sure and secure. The question should be resolved by faithful adherence at every step, to the common law, and not be determined by a chance expression, as if that has become unalterable law or "established almost without argument." The chance expression is not the polar star. Calling a non-navigable lake a meandered lake or anything else but a non-navigable lake, does not make it otherwise than it is; and therefore should neither divest title to it nor put it in ward as being controlled by a trustee.

While the United States held title its power to dispose of the property which is the whole subject of this litigation was plenary. The State was not, at that stage of affairs, a trustee as to any part of the property; no more so in law as to what was the lake than as to what was land unsubmerged. Since the lake was not a navigable body of water, it was not affected by any right of sovereignty on the part of the State of Illinois. Such sovereignty did, of course, apply to Lake Michigan and the waters of the state which were navigable in fact or were made navigable by Act of Congress. But no Act of Congress made this lake navigable, and no other human power could do so.

Jourdan v. *Barrett, supra.*

As the State was not proprietor, nor a trustee, when the United States owned the property, speaking both of land and water, neither did the State become proprietor when private ownership occurred through the issuing of a patent from the United States. The interest of the State in the property, as property, or in its sovereign capacity, was not enlarged by the issuing of a patent to a private individual.

The construction of such patent, so far as it needs construction, should be according to the principles of the common law. Such principles long antedated the admission of Illinois into the Union, and never lost existence through any act of the United States, nor could they be set aside by the words of any court. By such principles the lake was a private water, under the sensible classification of the common law applied to such bodies of water. A law of the State, if there had been such, to make it a public body of water would have been ineffectual; not less

ineffectual, we must say, when the United States parted with some or all of the property than when the United States owned every foot of it. Hence no phrase of any of the courts as to "state law" or "local law" should be permitted to change the common law classification, nor to change the rules of construction which were a part of the common law and in accord with which the lake was a boundary. The meander line was not a boundary. No court can now pretend it was; and when the various steps taken by the government to bring the land into market were taken, the State had no right to say so much, and no more, of what the government has for sale can become private property, and the rest will be held by the State in trust for all the people.

It was not property apportionable in proportion to accretions.

Claim of title by the State before the government of sale would have been inadmissible, and so likewise would have been a claim of title in trust through sovereignty. At each and every stage or period of time such intermeddling by the State would have been unauthorized.

As it is a case which should be governed by a law, that is to say, the common law applicable when the United States issued the patents, so it is a case in which no discrimination as to title should be made in the construction of the patents between land or water in Indiana and land or water in Illinois; the patents making no difference, and the fact that in one case a State was the patentee not making any difference in law in the construction of the patents.

This is a case involving proprietorship as to the whole property, which proprietorship does not concern sov-

ereignty, because the former lake was not and is not navigable, and therefore it is not a case to which the law of accretions can consistently be applied.

The case of *Hardin* v. *Jordan* received mature consideration. Great credit is due to the late Mr. Justice Bradley and to the other members of the court for the thoroughness of investigation displayed in that case, and for the eminently just and statesmanlike opinion given. No such chance expression as "State law" was the basis of decision in that case. This is remarked, not as signifying any slight upon any decision of a state court; far be it from the undersigned to intimate anything to the disparagement of decisions of the state courts in their sphere; all may be necessary to be considered in passing upon a common law case. But, as already remarked, this court did especially and particularly consider and follow the common law, as the Supreme Court of the state had done up to that time in all cases where a question really arose under the common law, and as the same court has continued to do, save in this case and a later case.

The government would have been constrained by the deed of cession from Virginia, based on the Act of Virginia of Oct. 20, 1783, to dispose of the lands faithfully, treating the fund arising therefrom "as a common fund for the use and benefit of such of the United States" as at the date of the deed had become or should "become members of the confederation."

Illinois would have no more right, legally speaking, to any of these ceded lands than Indiana or Maine. The United States acted for all, but with a beneficent care for the promotion and encouragement of actual settlement. In its proprietary interest the "United

States" was much more than a "private owner;" nor does it seem that it could ever be placed in that category except by a kind of metaphor when having sold off the public lands it receives authority from the State to take and hold certain lands for forts, arsenals and public buildings.

But returning to the point of consideration of the relation in which the United States held the public lands and offered them for sale: It so offered them as to encourage the encountering of perils and hardships incident to pioneer life, that homes might be made in the wilderness, to be protected, it might be, by the power of the government. The offer was on a basis of equality, and as the Ordinance of 1787 (Articles I and II) provided, with an assurance of freedom in respect to worship or religious sentiments, and the further assurance, among other things, "of judicial proceedings according to the course of the common law."

There was a solemn guaranty, freely adopted by the new states, as they were formed, that the new states should never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress might find necessary for securing the title of such soil to the *bona fide* purchasers.

Under the general laws which applied to the whole Northwest Territory, in all its parts, and to the public domain after the new states were formed, it certainly could not have been intended, nor expected, that the settler on the banks of Wolf Lake should obtain less right, in the purchase from the United States of a legal subdivision on the Illinois side of the lake, than would his neighbor, possibly his next door neighbor, in the purchase of a like legal subdivision adjoining the same lake, but on the

Indiana side, nothing but the State line dividing the subdivisions, and each having been first offered at public auction, and thereafter having been held by the United States until sold to such purchasers at the government price, at private sale.

This court was in *Hardin* v. *Jordan* first called upon to decide the real question here involved.

This was also before the State Court had occasion to consider that question. The presentation here *was fuller than in the state court*, and we submit there is no occasion to retract the decision which this court reached. Besides being first, as well as just, it was made, also, at the instance of the present defendant in error, as grantee of Mitchell, as much as at the instance of the first named plaintiff in error.

This court in *Hardin* v. *Jordan* honored and followed the common law, and had the prerogative right to determine the effect of the government patents. The decision was made, also, upon the same state of facts as those shown in this case.

The earlier decision should not be snuffed out, as if it were a dipped candle. Its pure light should not be hid under a bushel.

Questions as to the right of repose, and as to the propriety of disturbing what seemed to be put at rest many years ago, well up strongly, but can only be breathed.

And in making this application most respectfully, your petitioners will ever pray, etc.,

GERTRUDE H. HARDIN,
THE COOK COUNTY LAND AND DOCK COMPANY,
By THOMAS DENT,
Their Solicitor.

I, Thomas Dent, do hereby certify, as counsel for said plaintiffs in error, that the foregoing petition for a rehearing is presented in good faith, and in my judgment for good cause, for the promotion of justice, and not for delay.

THOMAS DENT,
Of Counsel.

No. 268.

Brf. of Mecartney for D. E.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 268.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY,
PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

HARRY S. MECARTNEY,
FOR DEFENDANT IN ERROR.

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No. ~~168.~~ 56

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY, PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD.

Memorandum of Corrections to be Made in Brief for Defendant in Error.

On page 37 strike out the words: "In doing so he took the *actual* shore lines on sketch 1, and then ran the apportioning lines as shown on 'sketch 3.'"

On page 44 strike out the word "Resume."

HARRY S. MECARTNEY,
For Defendant in Error.

IN THE

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GERTRUDE H. HARDIN and the COOK COUNTY CANAL AND DOCK COMPANY,
Plaintiffs in Error,
vs.
CHARLES B. SHEDD,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

Brief and Argument for Defendant in Error.

The writ of error herein has been sued out by the plaintiffs in error to reverse the judgment of the Supreme Court of Illinois, rendered in *Hardin* v. *Shedd*, 177 Ill., 123.

A reference to that decision and the earlier one of *Fuller* v. *Shedd*, 161 Ill., 462, would probably be the quickest way of placing before the court the controlling facts or issues here involved. The statements in those cases are full and naturally free from all danger of bias.

It probably would have done no violence to the economy of this court's time for opposing counsel to have first called attention to the State Court's judgment and decree, and then made a showing as to the Federal question which plaintiffs in error claim to have raised.

If this were resolved against them, or if this court should hold the whole question involved in its review to be one of local law and for the Illinois Supreme Court to decide, this court would have been saved the labor of reading the long detailed statements of facts in the first seventy-two pages of the brief.

The cases cited under the first two points in this brief are relied upon with confidence to show that there is no Federal question involved here.

The remainder are useful only in the event the court finds that it should review the action of the State Court, and are addressed to the merits of the decree, and the judgment affirming it.

The points to be made herein in the order treated below are:

1. No Federal question was "specially raised" by plaintiffs in error in the state courts.

2. The decision of the Illinois Supreme Court complained of involved a question of local law purely upon which its judgment was final.

3. This court will not inquire into the alleged errors of practice. Even if a Federal question were involved here, it would examine such question alone.

4. No such errors of practice were in fact committed.

5. The character of Wolf Lake, and the state's title to the bed thereof, and its jurisdiction thereover are all within the scope of local law and are by the State Supreme Court's decision foreclosed from inquiry here.

6. The apportionment of accretions under the decree is accurate and just.

7. Defendant in error takes no more land by the decree upon the accretion basis than he would have taken if the title to the submerged lands had been held to have passed under the patents.

I.

NO FEDERAL QUESTION WAS SPECIALLY RAISED IN THE STATE COURTS.

This writ of error is prosecuted under Section 709 of the United States Statutes. That section, so far as material here, is as follows:

"Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity, specially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority—may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error."

For the purpose of ascertaining precisely what attempts, if any, were made in the State courts by plaintiffs in error to raise a Federal question, we shall quote the pertinent parts of their answers in the Cook County Circuit Court and their assignments of error in the Illinois Supreme Court.

In the answer of Mrs. Hardin (Record, 30), which was adopted by the other plaintiff in error, it is alleged:

"That prior to thesurvey * * * the proprietary right to the lands in question and to the lake bed, and to the lake itself, was in the United States; that

after such survey had been made, the lands were regularly brought into market in pursuance of the Acts of Congress, and * * * were entered or purchased from the United States; that the same were sold and granted by the United States according to the plat of the survey thereof, returned to the General Land Office by the surveyor general; * * * that such lake bed passed to the patentees, who thereupon became and were seized thereof and as such of the same in fee simple; that it is under this claim that respondent's rights arose and exist; that therefore, as well as for other reasons, the attempted survey of the lake bed in 1874 was wholly unauthorized and irregular, etc.; that the rights of the grantees of said lands or patentees from the United States were fixed by the Common Law, and that the * * * respondent claims to the center of the lake as a part of the grant made by said patent of lands represented on said plat as bordering on said lake."

Mrs. Hardin and the Cook County Canal and Dock Company, on their appeal to the Illinois Supreme Court assigned amongst others the following errors:

"2. That said court erred in holding that the title to any of the lands, whether submerged or unsubmerged, was in the State of Illinois, and in refusing to give due effect to the patents through which appellants respectively deraigned title."

"5. That said court erred in not following or observing the riparian rights of said appellants, respectively, in respect to the present or existing Wolf Lake, and in refusing to allow them, respectively, any frontage thereon."

"7. That the basis or principle on which the decree proceeded in declaring divisional lines is contrary to the law and the equity of the case."

"8. That the decree is uncertain as to boundaries given, and is otherwise unjust to said appellants, severally and respectively."

It is apparent from an inspection of Mrs. Hardin's answer and the said assignments of error that no attempt was made in the state courts to set up any Federal question which could be reviewed in this court, unless it was some "title, right, privilege or immunity" claimed under a statute of the United States.

Nowhere in their answers is set up or specified any statute of the United States under which any right, title, privilege or immunity is claimed. On the contrary, in the answer of Mrs. Hardin, which was adopted by the other plaintiff in error, it is expressly stated "that the rights of the grantees of said lands or patentees from the United States were fixed by the *common law* and that method of adjustment of lines extending into the lake or through or over the body of water represented on said plat as a lake and is governed by *said law*, and by the rules which are thereby established."

The suggestions that after such survey the lands "were regularly brought into market in pursuance of the acts of Congress in such case made and provided," that such lands "were sold," etc., do not reveal any right or title specially set up or claimed under a United States *statute*. If this is a sufficient raising of a Federal question, the rule requiring it to be "specially set up or claimed" is

meaningless, since in such case it would be permissible to rely upon the whole body of the United States statutory law, without specifying any portion thereof.

The Federal question, as presented by the assignment of errors in the Illinois Supreme Court, is more tenuous even than in the answers in the Circuit Court. In said assignment of errors there is no reference, general nor special, to any statute of the United States. Nor is there any reference to any right claimed under a Federal statute.

The nearest approach to a Federal question which was raised in the Illinois Supreme Court was presented by the second error assigned *supra*.

In view of the numerous decisions of this court on this question we are apt to be "carrying coals to Newcastle," in attempting to review the authorities.

In the matter of *August Spies et al.*, 121 U. S., 131, the court say:

> "To give us jurisdiction * * * it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way. To be reviewable here the decision must be against the right so *set up or claimed*. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by counsel for the petitioners, a question of the waiver of a rignt under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned."

The case of *Maxwell* v. *Newbold*, 59 U. S., 511, was a writ of error to the Supreme Court of Michigan. In the State Supreme Court the third error assigned was as follows:

> "The charge of the court, the verdict of the jury and the judgment below, are each against and in conflict with the Constitution and laws of the United States, and therefore erroneous."

Chief Justice TANEY, delivering the opinion of the court, said:

> "Neither of the questions made there by the errors assigned refer in any manner to the Constitution or laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the Act of Congress, or the decisions of this court. It alleges, that the charge of the court was against, and in conflict with, the Constitution and laws of the United States. But what right did he claim under the Constitution of the United States which was denied him by the State court? Under what clause of the Constitution did he make his claim? And what right did he claim under an Act of Congress? And under what act in the wide range of our statutes did he claim it?
>
> "* * * So, in the case before us, the clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error in the State court, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the state court."

In *Hoyt* v. *Thompson*, 66 U. S., 521, the court said:

> "But in order to give this court the power to revise the judgment of the state court on that ground, it must appear upon the transcript filed by the plaintiff in error, that the point upon which he relies was made in the New York Court and

decided against him; and that this section of the Constitution was brought to the notice of the state court, and the right which he now claims here claimed under it."

The apparent confusion in regard to the particularity necessary in order to comply with the requirement of Section 709 of the Revised Statutes, that the right, title, privilege or immunity must be "specially set up or claimed" was removed in the decision of this court, by Mr. Justice BROWN, in the case of *Columbia Water Power Co.* v. *Columbia Electric Street Railway Co.*, 172 U. S., 476.

In that case the court said:

"To the argument that the Federal right was not 'specially set up and claimed' in the language of Revised Statutes, Section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here."

(1.) "Where is drawn in question the validity of a treaty, or statute of, or authority exercised under the *United States*, and the decision is against their validity."

(2.) "Where is drawn in question the validity of a statute of, or an authority exercised under, any *state* on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is *in favor of* their validity."

(3.) "Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against* the title, right, privilege or immunity *specially set up and claimed* by either party under such constitution, statute, commission or authority."

"There is no doubt that under the third class the Federal right, title, privilege or immunity

must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction."

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, that fact that it was not specially set up and claimed, is not conclusive against a review of such question here."

The following cases are also instructive upon this point.

Chappell v. *Bradshaw*, 128 U. S., 132.
Zadig v. *Baldwin*, 166 U. S., 485.
Kipley v. *Illinois*, 170 U. S., 182.
Oxley Stave Co. v. *Butler Co.*, 166 U. S., 649.
Telluride Power etc., Co. v. *Rio Grande etc., R. R. Co.*, 175 U. S., 642.
Chapin v. *Frye*, 179 U. S., 127.

THE CERTIFICATE OF THE CHIEF JUSTICE OF THE ILLINOIS SUPREME COURT DOES NOT GIVE THIS COURT JURISDICTION.

The Chief Justice of the Illinois Supreme Court entered an order to the effect that the plaintiffs in error, "by virtue of or under the land office certificates and patents from the United States * * * claimed title in fee to the lake bed or submerged lands in front of the tracts respectively described in said patents, respectively, as being part of the grant from the United States;" that said parties claimed the land to the center of the lake, and that the court "finding

that the lake, though non-navigable, was meandered in the government survey, denied the right of the said appellants to the lake bed or submerged lands, except as accretions were or should be formed, limiting them to the waters' edge, but giving them rights as the waters should recede, as the opinion of the court shows." (Record, 2.)

The heading to this order in the transcript, although of course not a part of the order, is: "order that a Federal question is presented." But there is nothing in the order itself to indicate that the court's attention was called to or that it passed upon any right, title, privilege or immunity under an act of Congress.

The learned counsel, in his brief, states that a Federal question was distinctly raised in the state courts.

It is submitted, however, that neither counsel's statement, nor the heading to the order, nor the order itself can make a Federal question out of a matter which is one of local law purely. It is especially urged that the order in question did not and could not show that any Federal question was raised in the state courts.

In *Powell* v. *Supervisions*, 150 U. S., 433, the court say:

> "The determination of the jurisdiction of this court to review the judgment of a state court under Section 709, of the Revised Statutes, necessarily devolves upon the court itself, and while the certificate of the presiding judge of the State Court as to the existence of the state of the case upon which our interposition may be successfully invoked is always regarded with respect, it cannot confer jurisdiction upon this court to re-examine the judgment below." Citing numerous cases.

II.

THE DECISION OF THE ILLINOIS SUPREME COURT COMPLAINED OF INVOLVED A QUESTION OF LOCAL LAW PURELY UPON WHICH ITS JUDGMENT WAS FINAL.

The local law of the state in which lands patented by the United States lie governs the construction to be given to grants of lands bordering upon waters whether navigable lake, navigable stream or non-navigable lake or stream.

The proposition above stated is the pivotal question of this case. If the law is correctly stated in it, this court is without jurisdiction to entertain this writ of error irrespective of the technical questions of procedure herein discussed.

If the law of Illinois is the test of the rights of the parties to this case under the titles shown by them, the whole contention of plaintiffs in error here resolves itself into a challenge of the correctness of the announcement by the Supreme Court of Illinois of what the law of that state is in the premises, and the "Federal question" is nothing more or less than this: "did the Supreme Court of Illinois correctly apply the laws of Illinois to this case in which both parties are its citizens? If that were a "Federal question" every judgment of a state court of final resort would be reviewable in this court.

That the proposition stated above is the doctrine of this court there can no longer be any possible doubt. That is the one point on which both the majority and the dissenting minority of this court agreed in *Hardin* v. *Jordan*, 140 U. S., 371.

Mr. Justice BRADLEY in the majority opinion in that case after reciting the facts, opens his discussion of the law with this preliminary statement:

> "Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. *This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the State of Illinois.*" * * *
>
> "This right of the state to regulate and control the shores of tidewaters and the lands under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and in Pennsylvania, to all the permanent rivers of the state; *but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised.*"

In another place in the same opinion the learned writer says:

> "We do not think it necessary to discuss this point further. In our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the lands lie."

The learned justice then proceeded in the logical order to inquire what was the local law of Illinois on the subject in hand and reached the conclusion that it was the general common law unchanged.

He next inquired what the common law was in such a case and concluded that it gave the riparian proprietor title to the bed of the lake to the center thereof.

There is no suggestion in this opinion of any doubt that this court would be bound to follow any distinct and unmistakable declaration by the Supreme Court of Illinois of what the law applicable was, whether it accorded with this court's view of the common law or not.

The dissenting opinion rendered in that case by Mr. Justice BREWER, and concurred in by Justices GRAY and BROWN, adopts the same doctrine of the controlling authority of the local law of Illinois, but reaches a contrary conclusion in its inquiry as to what is the "local law of Illinois," applicable to the case.

This opinion opens with the following paragraph:

> "Mr. Justice GRAY, Mr. Justice BROWN and myself are unable to concur in the foregoing conclusion. Beyond all dispute the settled law of this court, established by repeated decisions, is that the question how far the title of the riparian owner extends is one of local law. For a determination of that question the statutes of the state and the decisions of its highest court furnish the best and the final authority. In the case *St. Louis* v. *Rutz*, decided at the present term (138 U. S., 226, 242), it was said by Mr. Justice BLATCHFORD, speaking for the court: 'the question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi river, extends to the middle thread of the stream, or only to the waters' edge, is a question in regard to a rule of property, which is governed by the local law of Illinois.' *Barney* v. *Keokuk*, 94 U. S., 324, 338; *St. Louis* v. *Myers*, 113 U. S., 566; *Packer* v. *Bird*, 137 U. S., 661. In *Barney* v. *Keokuk*, it is said that if the states 'choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objection.'"
>
> The cases referred to in this quotation affirm the same doctrine."

In the case of *Shively* v. *Bowlby*, 152 U. S., 1, this court entered into a most exhaustive examination of the questions affecting riparian rights and the law applicable thereto. *Hardin* v. *Jordan*, *supra*, is discussed and special attention given to the fact that both the majority and minority opinions agreed that the law applicable to the case was the local law of Illinois.

Perhaps the most succinct statement of the law in the opinion, which was rendered by Mr. Justice GRAY, is contained in the following paragraph:

> "In *Parker* v. *Bird* (1891), 137 U. S., 661, the general rules governing this class of cases were clearly and succinctly laid down by the court, speaking by Mr. Justice FIELD, as follows: 'the courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property by the grantee. As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream,' 137 U. S., 669, 670. And it was accordingly held, affirming the judgment of the Supreme Court of California, in 71 Cal., 134; and referring to the opinion in *Barney* v. *Keokuk*, above cited, as specially applicable to the cases, that a person holding lands under a patent from the United States, confirming a Mexican grant bounded by the Sacramento river, which was navigable in fact, took no title below the high water mark, either under the Acts of Congress or by the local law."

In *St. Anthony Falls Water Power Co.* v. *Board of Water Commissioners*, 168 U. S., 349, this court had under consideration a writ of error to the Supreme Court of Minnesota in a case affecting riparian rights and passed on identically the same questions which must control this case.

Mr. Justice PECKHAM, delivering the opinion of the court says:

> "In regard to the first proposition, we are of the opinion that the property rights of the plaintiff in error, as riparian owners, are to be measured by the rules and decisions of the State of Minnesota. This principle, we think has been announced and adhered to by this court from its very early days, and no distinction has been made between the rights of the original states and those which were subsequently admitted to the Union under the provisions of the Federal Constitution."

In another place the learned Justice says:

> "It is true that in these various cases the exact point in controversy in this case in regard to the rights of the state as against riparian owners has not arisen. The dispute has generally been as to the extent and character of the title as between the United States, or the state and the riparian owner to lands under water, and as to the right of the riparian owner to build out from the shore piers or wharves so as to reach the navigable portion of the stream; but the principles laid down in all of these cases necessarily include the rights of the state courts to decide, as a matter of local law, the point now under discussion, subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers. The jurisdiction of the state over this question of riparian ownership has been always

and from the foundation of the government, recognized and admitted by this court. The extent of the plaintiffs' riparian right of property was therefore the subject of adjudication by the State Court, and the rule has been definitely stated by that court in its judgment which is now under review.

"It is claimed, however, by the plaintiffs in error that this judgment is the only case in the state where the ruling made therein has been adopted, and that this particular judgment is at war with and opposed to every other ruling upon the subject heretofore made by the Supreme Court of this state; and they contend that upon the authority of *Hardin* v. *Jordan, supra*, this court should disregard the judgments of the State Court in this case and follow the previous decisions of that court on this subject. As to the case of *Hardin* v. *Jordan*, it may be said that it went as far as this court ought to go in refusing to follow the ruling of the Supreme Court of Illinois, in *Trustees of Schools* v. *Schroll*, 120 Illinois, 509. It was placed upon the asserted fact that such ruling of the Supreme Court of Illinois was not necessary to the decision of the case, and that, being opposed to the entire course of the previous decisions of that state, it should be disregarded. It is not so here. The ruling of the State Court was necessary to the decision of this case and stands as the latest, if not the only, exposition of the views of that court upon the question involved. We ought therefore to follow that case."

As notice, in *Hardin* v. *Jordan*, this court unanimously held that the determination of the riparian rights of the patentees on *this particular lake* is a matter entirely within the right of the Supreme Court of Illinois to determine. That court has spoken in this case. No" Federal question," can possibly be involved in a state court's decision as to questions governed entirely by its own law.

The inevitable logic of the case is that no question is raised here which this court will be called upon to consider except the *claim* made that a Federal question is properly raised on this record. *Hardin* v. *Jordan*, *supra*, and the other cases cited settle that adversely to plaintiff in error, it would seem, beyond the possibility of cavil.

It was decided in *Hardin* v. *Jordan*, that the shore owners took to the center of the lake in question. This decision was based upon the theory that it was in accordance with the decisions of the Illinois Supreme Court.

After the decision in *Hardin* v. *Jordan*, *supra*, the Illinois Supreme Court has twice distinctly and unequivocally decided that such shore owners do not take to the center of the lake, but to the water's edge only. One of these decisions is the one which is under review here. The other is the case *Hammond* v. *Shepard*, 186 Ill., 235.

Under these circumstances it is contended that this court is not bound to follow the latest decisions of the state court, and "is not bound to surrender its own judgment of the law," etc.

In support of this contention the learned counsel for plaintiffs in error cited the following cases:

Yates v. *Milwaukee*, 77 U. S., 497;
Pease v. *Peck*, 59 U. S., 595;
Town of Roberts v. *Bolles*, 101 U. S., 119;
Morgan v. *Cortenius*, 20 How., 1, and
Gibson v. *Lyon*, 115 U. S., 439.

In regard to the above cases, it need only be said at this time that none of them originated in the state

courts. The distinctions in the rule, pointed out in later decisions of this court, between cases originating in the United States Courts and cases originating in the state courts effectually disposes of the above cases as authority here.

In *Central Land Co.* v. *Laidley*, 159 U. S., 103, Mr. Justice GRAY, speaking for the court said:

> "The distinction as to the authority of this court between writs of error to a court of the United States and writs of error to the highest court of a state, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice SWAYNE, and in each of which the question presented was whether the constitution of the State of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The Supreme Court of the state, by decisions made before the bonds in question were issued, had held that it did; but, by decisions made after they had been issued, that it did not. A judgment of the District Court of the United States for the District of Iowa, following the later decisions of the state court, was reviewed on the merits, and reversed by this court, for misconstruction of the constitution of Iowa. But a writ of error to review one of those decisions of the Supreme Court of Iowa, was dismissed for want of jurisdiction, because admitting the constitution of the state to be a law of the state * * * the only question was of its construction by the state court."
>
> "This court, therefore, has no authority to decide the main questions argued at the bar, whether the decision of the Supreme Court of Appeals of West Virginia, in effect, and erroneously, overruled the prior decisions of that court, * * * and the writ of error must be dismissed for want of jurisdiction."

In *Wade* v. *Travis County*, 174 U. S., 499, which was taken from the United States Court of Appeals, to this court on a writ of certiorari, this court in speaking of the rule in question, said:

> "If there be any inconsistency in the opinions of these courts, the general rule is that *we follow the latest settled adjudication in preference to the earlier ones.* * * * In *Green* v. *Neal's Lessee*, 6 Pet., 291, a construction given by the Supreme Court of Tennessee to the statute of limitations of that state having been overruled, this court followed the latter case, although it had previously adopted the rule laid down in the overruled case."

The claim of plaintiffs in error is tantamount to asking this court to hold:

1. That, while the rule of the effect or extent of the grant is one to be decided by the State Court; and, 2, while in any suit pending in this court the State Court's holdings will be followed if ascertainable; 3, yet, where the State Court has formally and explicitly announced its ruling, and this should, perchance, be different from a certain *prior* decision of this court, the latter should continue ever afterwards to differ from the State Court, and the matter as to *that particular state* be held *not* to be one of local law.

III.

THIS COURT WILL NOT INQUIRE INTO THE ALLEGED ERRORS OF PRACTICE. EVEN IF A FEDERAL QUESTION WERE INVOLVED, IT WOULD EXAMINE SUCH QUESTION ALONE.

A writ of error to a state court brings before the Supreme Court only the Federal question in the case.

Ashley v. *Ryan*, 153 U. S., 436.

The Supreme Court will not review any question as to the admission or rejection of evidence in the State Court which does not bear directly upon some matter of a federal nature.

Mallett v. *North Carolina*, 181 U. S., 589.
Cleveland & Co. v. *Backus*, 154 U. S., 439.
Central Pacific etc., Co. v. *State of Cal.*, 162 U. S., 91.

IV.

NO SUCH ERRORS OF PRACTICE WERE IN FACT COMMITTED.

It is not thought that this court will look into these questions. The alleged errors of practice in the state Circuit and Supreme Court are, as we gather from the brief of the opposisition as follows:

1. That the decree awarded to Mr. Shedd property which he did not claim in his petition.

2. That the Circuit Court erred in ruling out evidence of the judgment by default in United States Circuit Court in the *Hardin* v. *Jordan* case.

3. That said Circuit Court erred in ruling out evidence that Wolf Lake "has but little depth or likelihood of permanence unless artificially sustained and protected," and "that for *some* years it has been kept at an artificial elevation by the petitioner, Shedd," for ice purposes, etc.

This case is what is locally called a "Burnt Record" case. In such a proceeding, the court has power after ascertaining the destruction of the records, to

restore the record of lost deeds, etc., to decree in whom title is vested, and to proceed according to general chancery practice.

In the two petitions of Mr. Shedd he claimed to be the owner of "Fractional section 29, and south-west fractional quarter of section 20." (Record, 11 and 14.)

These descriptions were entirely adequate to describe the land, no matter where the boundary lines should be held to run—whether to have originally extended across submerged land, and to have been thus permanently fixed, or to have been originally confined to upland or dry land and to have gradually extended with the growth of accretions.

This being so it matters not that Mr. Shedd in his petition adds to his description of the fractional south west quarter of section 20, the statement "including" certain land, etc.

For it is now well settled that "fractional" sections or quarter sections as established by United States surveys upon meandered waters may extend beyond the boundaries of such sections or quarter sections as ordinarily squared out. And, although in the pleadings of several of the parties (Mr. Shedd included), it is intimated that the pleader supposed that the fractional quarter section would be held to be squared out in the ordinary manner, the lawsuit was for the recovery of *all* "fractional S. W. ¼ of section 20," and *all* "fractional 29," etc., each of which is in and of itself a definite and certain description.

The lands claimed by Mrs. Hardin overlapped with those lands claimed by Mr. Shedd. And she in various ways raised the issue of boundary lines both in her

answers and cross-petitions, many of which allegations are scheduled on pages 14 to 22 of her counsel's brief herein, such as the claim (p. 14): "That petitioner (Shedd) should be limited to a tract of about seven acres in the south-west quarter of fractional section 29;" (p. 15): "Respondent claimed to be the owner in fee of a larger portion of section 29, the same being a part of the lake bed," and "That there should be a *fair adjustment of the rights of the petitioner (Shedd) and of the respondent in respect to the lake bed,* etc.;" (p. 19): "That her petition as to the two first named tracts" (S. E. frl. ¼, Sec. 19, and the N. E. frl. ¼, Sec. 30), "*extended to the center of Wolf Lake;*" that the judgment in the suits theretofore pending in the United States Courts "gave rights to the *lake bed to the center of the lake,*" etc. (p. 21): that in her cross-petitions Mrs. Hardin "asked *affirmative relief* as applicable to the aforesaid tracts in sections 19 and 30, and such portions 'of the bed of the lake,' as she would be entitled to, etc. (p. 21).

Hence all the lands here claimed by these parties were involved in this proceeding originally and each party sought by his or her pleadings either by answer or petition or cross-petition to have *riparian rights and boundaries* adjusted. The mantle of the suit was as wide as the scope of the pleadings.

2. Mrs. Hardin's answer referred to the then pending United States Court case of *Hardin* v. *Jordan*, but she did not plead said action in bar of this proceeding or ask to have the latter stayed until the former should be finally disposed of.

In no evnet could Mrs. Hardin successfully have taken either of these steps, for Mr. Shedd was not a party to the Federal court cases. (Record, 435.) But with no protest from any of the parties the State Court proceeding has been pressed to a finality.

After the Illinois Supreme Court had finally decided the claims under the second patents of 1874 to be void Mrs. Hardin took judgment by default in the United States Circuit Court against the so-called "second patentee" defendant in said cause of *Hardin* v. *Jordan* (Mr. Dent's brief, p. 228), the judgment being so drawn as to cover a large quantity of land ultimately awarded to Mr. Shedd in the decree herein under review here. (Record, 433.)

The said judgment (entered December 10, 1896, Record, 431), was rendered after the judgment in *Fuller* v. *Shedd* (January 17, 1896, Record, 426).

The latter was the first *final* adjudication of the subject-matter, and even had the parties to both cases been identical, the former could not have been pleaded in abatement or bar thereof.

In the motion made by Mrs. Hardin in the ejectment case for a writ of possession it was suggested to the court, Judge SEAMAN presiding, that since the commencement of said cause, Shedd had entered upon certain portions of the land in question and given leases to certain persons formerly tenants of the second patentees and who were defendants to said suit (p. 227 of Mr. Dent's brief). Judge SEAMAN found that certain of the land upon which Mr. Shedd had entered had become and was vacant at the time of such entry and declined to issue the writ against him or his tenants as to such portions.

As to several other portions the court found that Mr. Shedd's entry was by permission of tenants under Jordan, who were parties to the judgment and that Mrs. Hardin was entitled to oust him as well as said tenants under her judgment; and the court issued the writ against them for that purpose.

The court did not intimate, however, that Mr. Shedd's title (which was adverse to all parties to said suit) was affected by such order, but expressly held that it was not. And it will be shown below that it was not.

Hence, the former suit of *Hardin* v. *Jordan* does not affect this proceeding in any manner, and is to be regarded as if it were between parties not one of whom is a party here.

An entry upon vacant land by one not a party to the suit, and having a claim of title hostile to and independent of both plaintiff and defendant, does not make him amenable to ouster under the judgment, much less does it in any way affect his title.

Sedgwick & Wait Trial Title, § 566.
State v. *Giles*, 10 Wis., 101.

While an entry of an adverse claimant during pendency of the suit by connivance with the tenant would not save the claimant from *ouster* under the writ (*Hall* v. *Dexter*, 3 Saw., 434), yet it could by no means affect the *title* untried in the action.

Sedgwick & Wait, § 562.
Murfree on Sheriff, § 1024.

So that as to either the land Mr. Shedd was alleged to have "entered upon" or that as to which he had

"given leases" his title was not adjudicated and such entries could not affect the title tried here, no matter whether the claim of adjudication had been set up by appellants under appropriate pleadings or not.

3. The offer as to the lake being artificially "sustained," etc., and in respect to it having become "permanently" dry, was vague and could have made no difference in the ultimate disposition of the case. No evidence of any such facts as existing prior to the fall of the year 1891 had been introduced in the case.

Were any discretion left in the lower court to take or not to take further testimony in the case, certainly it was correctly exercised against such admission. The whole *history* of these lakes was gone into. The quantity of land, the rising and the falling of the water in flood times and in dry times, the influences that caused the rise and fall, its connection with Lake Michigan, etc., these points were all covered by the testimony of half a hundred witnesses starting away back in the 40's and coming down to the time of the hearing. Many surveyors had made surveys of the contour of the land and water and the height and depth of each. Plat after plat was introduced in evidence, and detailed examinations based thereon, all recorded in voluminous record.

Surely, if there ever is to be an end to litigation, there is a demand for it in this case, and Judge TULEY's action in declining to hear further evidence was an exercise of the wisest discretion. The *status* of the land and water, the quantity of each, was specifically found by this court, necessarily referring to the time of the commencement of the suit, and lines could be run upon

that basis. It was, therefore, but right in the court to run the lines in this finding of facts as of that time, and if any changes in the *status* of the land or water had taken place subsequently thereto by any alleged artificial means, or otherwise, it could be the subject of a separate bill.

Again, if there were apt to arise any difficulty as alleged, in carrying out the decree of the court so entered in pursuance of the Illlinois Supreme Court's findings, there is a well known remedy of "Bill in Aid of Execution" that could have been resorted to; or such relief might have been in the nature of a supplemental bill or petition, or cross-petition; and none such was offered to be filed by the appellant.

And what if the shore line had changed? It is of necessity a shifting line. There was no telling that if the waters of Lake Michigan should rise that the area of dry land might not be less than found by this court.

To the effect that the judgment in *Fuller* v. *Shedd* was a final judgment, and that the lower court had no right to receive the offered evidence, see:

Woodham v. *Gay*, 83 Ill., 250.
Hock v. *Richardson*, 115 Ill., 431.

In *Mfg. Co.* v. *Wire Fence Co.*, 109 Ill., 71, the decree of the lower court as to payments of royalties, was held erroneous (page 81), and it was also held a *different ratio* should be paid by one party to the other. The cause was remanded to modify the decree.

Later in *Same* v. *Same*, 119 Ill., 31 (46), it was ruled that the lower court had nothing to do on said reversal but *follow directions*.

(Compare this case with the one at bar; in the former the upper court held that by the decree of the lower court one party was not compelled to pay *enough* royalty, and the cause was remanded; and the lower court directed him to pay *more*. In the present case this court found the decree of the Circuit Court awarding the lake bed to the first patentees was erroneous in giving *too much* land, and in this respect only, and that it should have *limited* them to the water's edge. Hence the only tning the court below had to do was to limit each first patent owner to the water's edge and run the boundaries on *this basis* instead of the other.)

The court says in said last cited case (p. 46):

> "Where it appears from the opinion that the *grounds of reversal* are of a character to be obviated by subsequent amendments of the proceedings *or* the introduction of further evidence, or both, it is the duty of the trial court to allow it. But where the case is remanded with directions to modify, not requiring any change in pleadings or introduction of new evidence, *but only to have decree conform to case made by the record*, nothing remains to be done but to make that modification."

V.

THE CHARACTER OF WOLF LAKE AND THE STATE'S TITLE TO THE BED THEREOF, AND ITS JURISDICTION THEREOVER ARE ALL WITHIN THE SCOPE OF LOCAL LAW AND ARE BY THE STATE COURT'S DECISION FORECLOSED FROM INQUIRY HERE.

Under headings numbered II to VIII, inclusive, XIII and XVII there are various suggestions questioning the state's title to the lake bed.

These are all foreclosed, as elsewhere shown by the decision in *Fuller* v. *Shedd*, which is to control here, and sufficient reasons are given in said decision for the holding of the State Court.

The suggestions in effect are an attack upon the whole body of state decisions where the same rule is held to be correct; and to give them out at this late day seems temerous.

Suffice it to say:

1. The state gets its title by virtue of its *sovereignty*.

2. Whether upon the establishment of the state the United States continued to hold title to the lake bed; or whether its title to the lands around the lake were held to have been a proprietary one purely and as to boundary lines to be subject to local law and state court construction; — or whether the acts of meandering and platting alone *first* brought the government title into the realm of local law;—certain it is that by the *sale* and *patenting* of the lands to private parties, the government *abandoned all* its title and yielded the lands *wholly* to the sovereignty of the state.

3. If the state can *hold* title to submerged lands by virtue of its sovereignty, it certainly can *receive* title thereto by an act which *abandons* them to its sovereignty.

The decision of the land office on the claim made to the bed of Wolf Lake under the Swamp Land Act by the State of Illinois, has no bearing on this case.

Considerable space is taken up in the brief of plaintiffs in error with the argument that the decision of this case by the state courts was erroneous on the

ground that the state was estopped to claim title to the bed of this lake by the decision of the land office adverse to a claim made by the state and the county of Cook, under the Swamp Lands Act of September 28, 1850 (9 Stat. at Large, 519).

The point is without force for several reasons. First, the question whether a state Supreme Court properly applies the law of prior adjudication is not, and cannot be a "Federal question," any more than the question whether it has properly decided any other question under its local law.

Secondly, the State of Illinois is not a party here and there was no pretense of establishing or finding any proprietary or private title or interest existing in it to the lake bed, but only a public and sovereign title which it holds in its political capacity as trustee for the whole people of the state and inalienable in perpetuity. It is the same character of title as was held to exist in the State of Illinois, in the bed of Lake Michigan in *Ill. Central Ry. Co.* v. *People*, 146 U. S., 387.

Mr. Justice FIELD rendering the opinion in that case says, in regard to the state's title in the bed of that lake:

> "But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open for preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein freed from the obstruction or interference of private parties."

VI.

THE APPORTIONMENT OF ACCRETIONS UNDER THE DECREE IS ACCURATE AND JUST.

"No. 7 of the specification of errors relied on," page 70 of our learned adversary's brief is as follows:

" That the court erred in awarding an undue portion of the former submerged lands to the said Charles B. Shedd, and an inadequate portion to the plaintiffs in error, respectively, contrary to the claim made by the said plaintiffs in error, respectively, under the laws of the United States."

Such "claim" made by plaintiffs in error was that the state court should have adopted a different basis for division, viz.: The "lake bed" rule of *Hardin* v. *Jordan*.

The complaint of an award upon *one* basis "contrary to" a demand for award upon *another* basis does not seem to be a distinct complaint of the accuracy of the actual award if the basis *adopted* be correct.

And the points scheduled in the brief proper do not any more clearly reveal such a complaint; the only ones at all applicable being Nos. XIV, XV and XVI, which are chiefly appeals for the application of the private-ownership-of-the-bed rule.

The suggestions, too, under those headings support our interpretation of them, being chiefly appeals for a shortening of the two tongues of land to almost nothing and an extension of Hrs. Hardin's lines across the *solid land* of said tongues to the state line in accordance with counsel's "map 16." (It would seem

that the remark of Mr. Justice WILKIN in *Hardin* v. *Shedd* that this "was in effect claiming the whole lake bed," was not inappropriate.)

So that it is thought that counsel for Mr. Shedd is not called upon to justify the accuracy of the State Court's decree upon the principle of "accretions," *if* the principle be right; and he has thought it scarcely necessary to prolong this document with many citations and explanations in justification thereof.

But we give such as we think are ample in case the court is impelled to review said decree.

AS TO THE FINDINGS OF FACT BY THE STATE SUPREME COURT IN FULLER V. SHEDD.

It would seem to be unnecessary at this late day, to refer to evidence in the record to sustain such findings of fact.

Four courts have passed upon the facts, Judge GRESHAM (whose findings are reported in *Hardin* v. *Jordan*), this court in said case of *Hardin* v. *Jordan*, Judge TULEY, and the State Supreme Court in *Fuller* v. *Shedd*, and there is but little variance in the findings; those of the State Supreme Court being the most explicit in respect to the original character and extent of the ridge and the growth of accretions.

The growth and extent of accretions was of necessity involved in the labors of said court upon the first appeal, and in this way: Voluminous testimony had been given as to the whole *history* of the land and water, the height and depth of each, etc., the amount of land that was formerly permanently above the water, etc., and also the actual conditions in later years. It was

argued by the second patent counsel that the land on both sides of the ridge and between the tongues of land had existed at the time of the first survey in 1834–5. Said court found and had to find what land existed at the time of the commencement of the suit, and had to account and did account for it. It had to find and did find that part of this land had grown as *accretions*, and finding what this part *was* of necessity found the amount of *permanent* land in 1834–5. This was done in order to test the question of mistake or fraud in the original surveys. All parties were in court, and were heard upon all these facts and had a right to anticipate any *theory of law* that might ultimately be held to be right. They were also all in court upon the hearing on the appeal, and bound by the court's action thereon. In justification of its findings, said court gave its interpretation of the evidence and a history of the formations, and accounted specifically for them.

In the State Circuit Court Mrs. Hardin produced a certified copy of the findings of fact preceding the opinion in *Fuller* v. *Shedd* (161 Ill., 462), and contended that these should be taken in connection with those stated in the opinon, because delivered by his Honor Mr. Justice PHILLIPS, who delivered said opinion. The enumeration of those findings for Judge TULEY's use referred to in his opinion upon the last hearing before him (Mr. Dent's brief, p. 221), were as follows:

1. Page 466 of the Report: There existed at the time of the original survey *a ridge* between fractional Section 29 and South West quarter of Section 20, which was but *slightly* covered with water, and at sev-

eral points along this ridge islets existed, one having trees growing thereon.

2. That "an outlet from the west side of the lake connected with the Calumet river, through which the water flowed from the west part of the lake."

3. At different seasons of the year as early as 1841 the ridge was often above the level of the lake, and in the course of a few years the ridge materially increased in width and was above the level of the water at ordinary stages. The land on the ridge and along the margin of the lake above the mean level of the lake *existed in* 1874. That the plat on which the second survey was based did not show "the ridge" (*continuous*), which at ordinary stages was *above* the water and contained a large number of acres of dry land.

4. By *reason* of this (*continuous*) *ridge* the water was divided into *two lakes*. That to the east was known as Wolf Lake, and that to the west known as Hyde Lake.

5. He further finds, p. 472 of opinion: At the time of the original survey the tongue of land from the north extended south from the center line of Section 20 about 220 rods, and the tongue of land from the south extended north from the south line of Section 29, about 160 rods.

6. That these two points at their extremities were about 80 or 90 rods apart.

7. The level of the waters of the lake when they reach the meandered line of the original survey would be about 2.2 feet above datum.

8. Reeds and coarse grass grew in the water around the margin of the lake and between these two points.

9. A strip twenty to twenty-five rods wide on both sides of the *ridge* (*continuous*) and around the margin of the lake became dry land *since* 1874. Page 473.

10. That there was no fraud or mistake in the original surveys (and hence it follows that the patentees under the first patents took all the land in sight).

11. That the lake was two to three miles long from north to south and about the same from east to west. (Page 471.)

If these findings of facts are adopted, there is little or no use for much argument nor for many explanations here. If the one lake had become divided into *two* lakes, there can be no plausible claim that Mrs. Hardin's land bordering on the one, can take land on the other.

Meander lines cut no figure in this case, except where they coincide with actual shore lines and then only by *reason* of such coincidence (as shown elsewhere and not heretofore disputed) the status as to actual shore lines at time of original survey averaging up the width of the north tongue of land at about twenty-eight rods would be something like this: ("Sketch 1.")

(Between the two points the ridge is meant to be represented as slightly covered with water. The dots represent marsh.)

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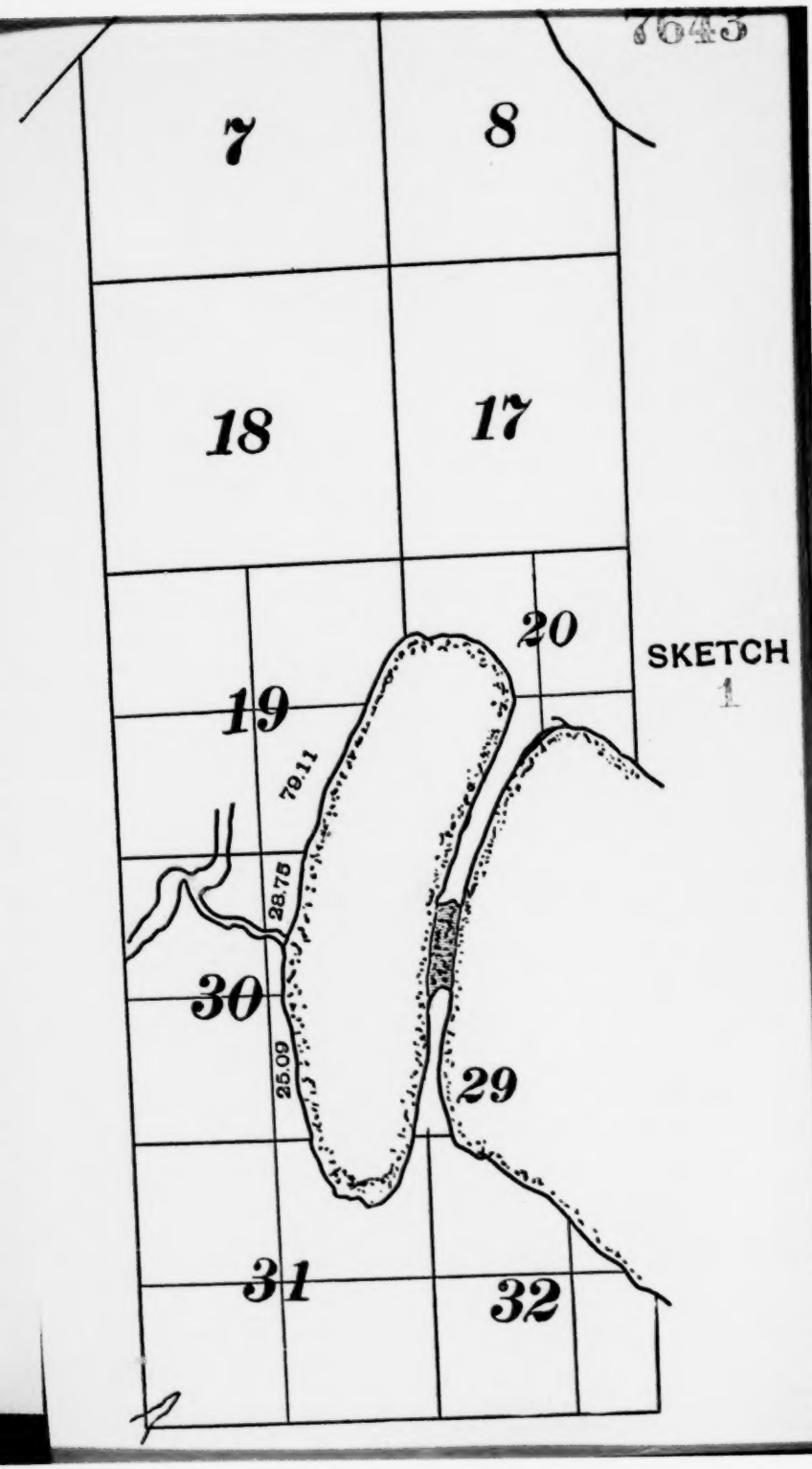

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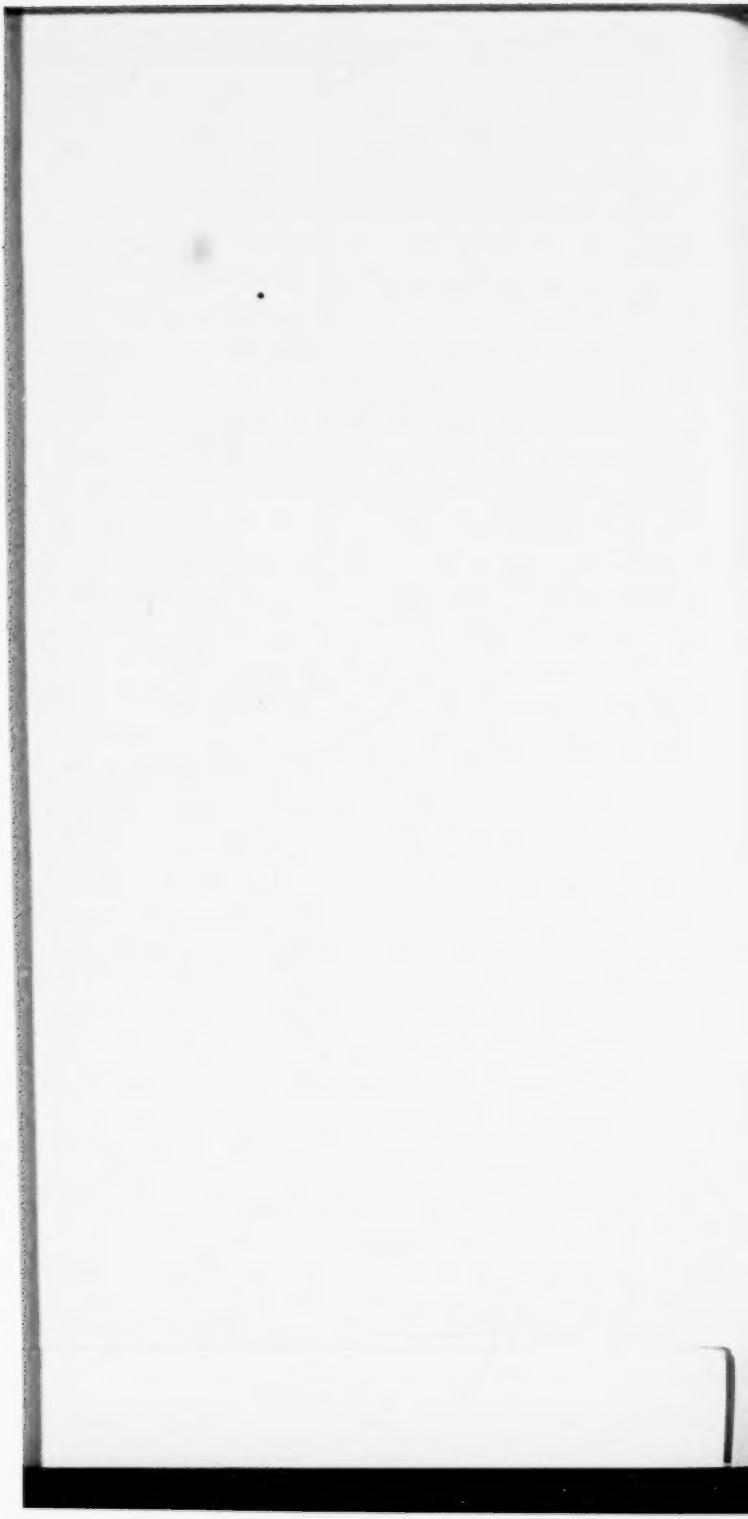

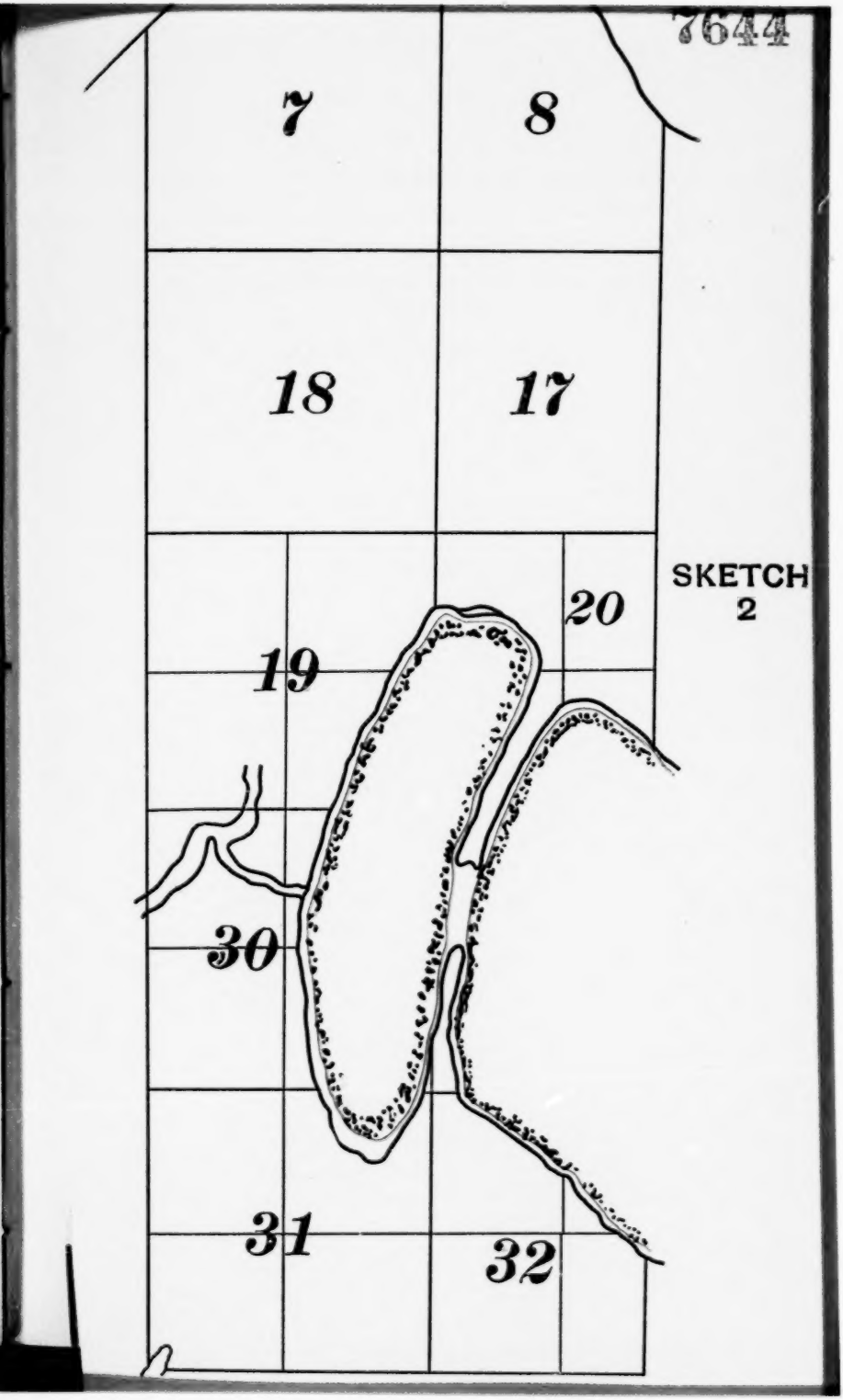
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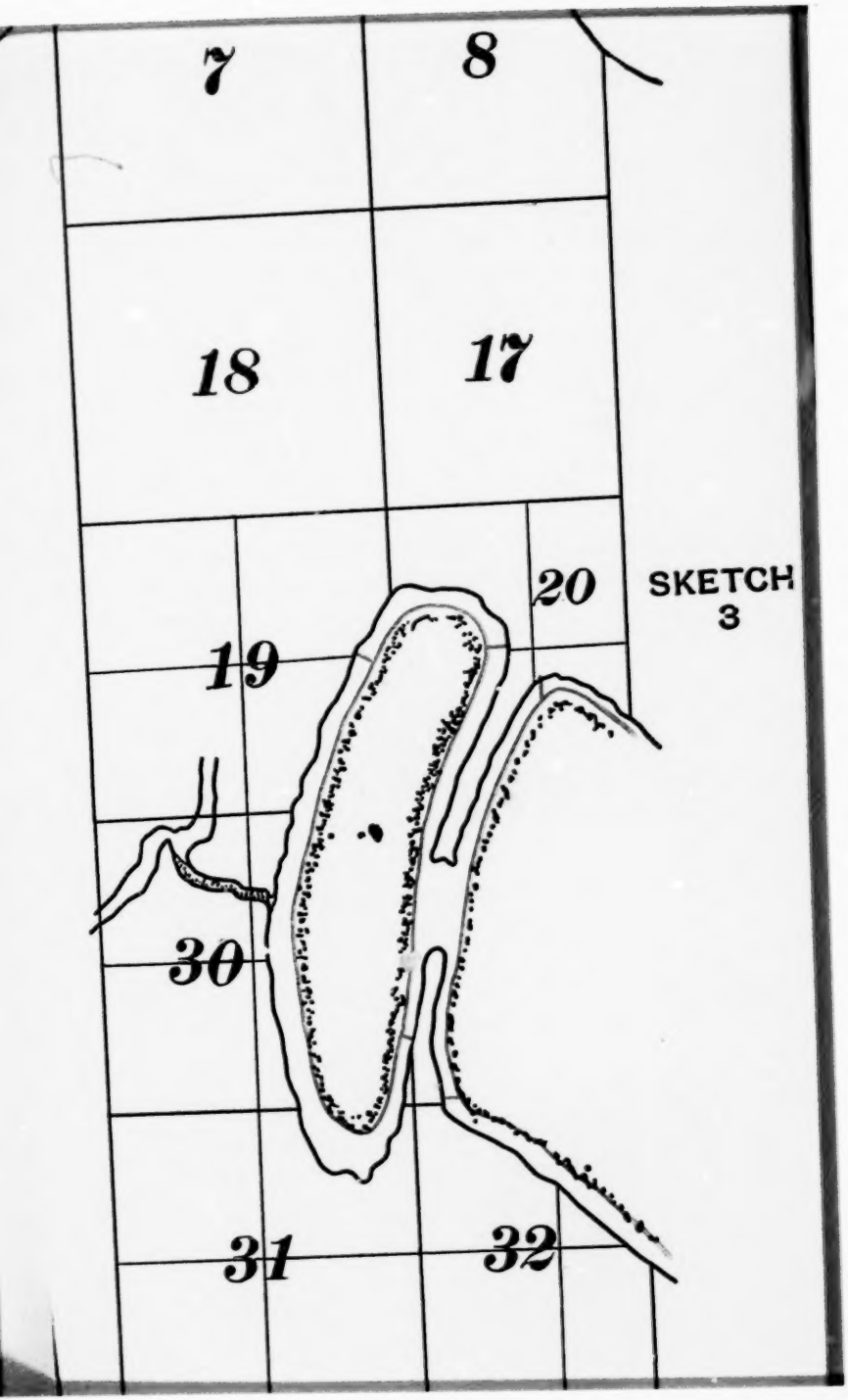
In the course of a few years the *ridge* increased in width and was at ordinary stages "above the level of the water", so that in 1874, by reason of *the ridge* (*continuous*) the lake was divided into two lakes, and the outlines might be thus shown: ("Sketch 2.")

(The red line represents the new shore line.)

Since 1874 there was a further recession, causing dry land to appear on both sides of the ridge and covering a strip around the margin of the lake of twenty to twenty-five rods wide, and the sketching would be something like this: "Sketch 3."



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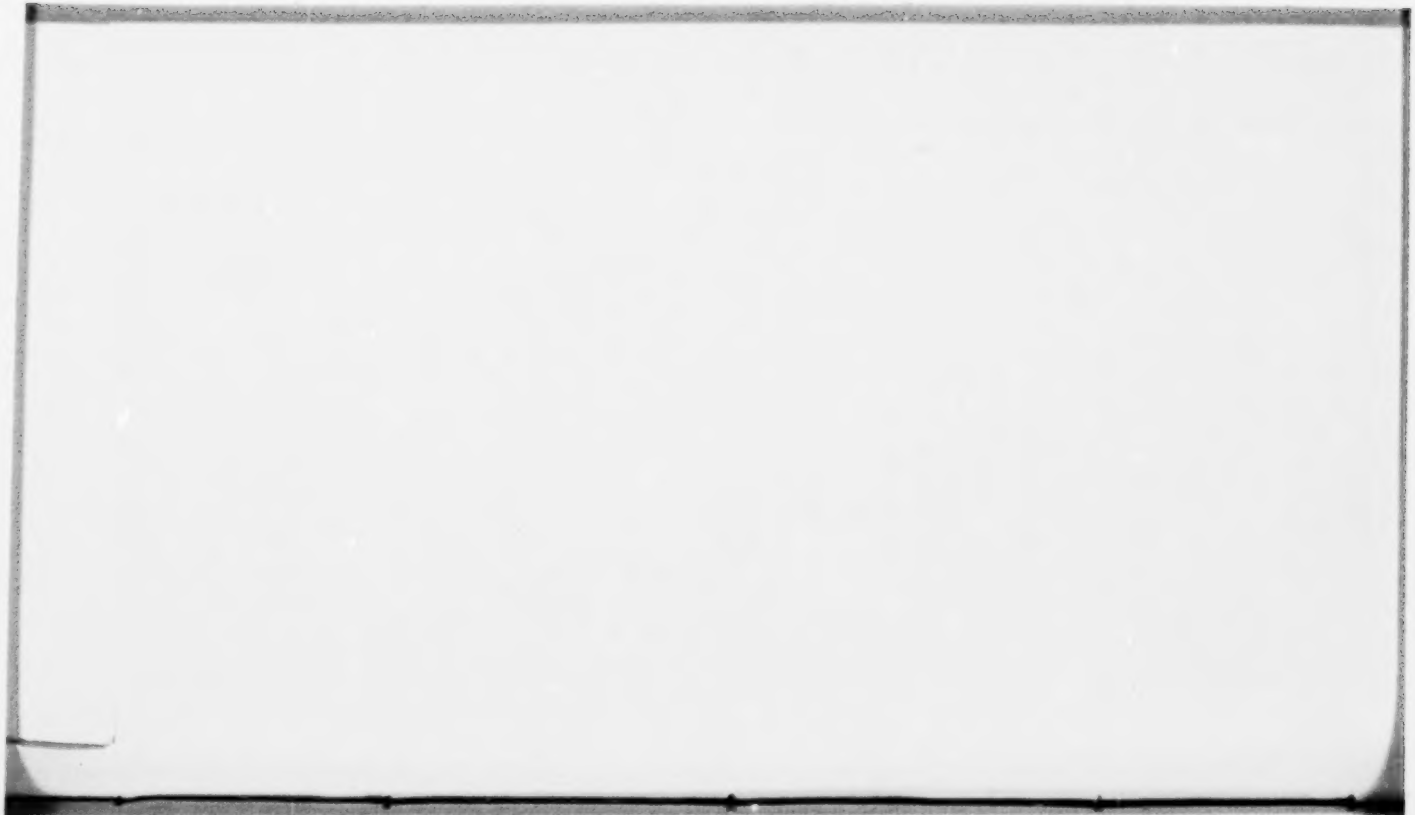


These three rude sketches are meant to be illustrative of the findings of this court as to the three points of time, the first, 1834–5, the second 1874, or prior thereto, and the third the time of the filing of the petition or some date prior thereto when the twenty to twenty-five rods strip was found to have become permanently dry.

It was appropriate, therefore, for Judge TULEY, taking up the work where the State Supreme Court had left off to take the last situation and apportion the accretions thus displayed in the third sketch.

~~In doing so he took the *actual* shore lines on sketch 1, and then ran the apportioning lines as shown on "sketch 3,"~~

ACCRETIONS.

Definition: Accretion is the process of gradual and imperceptible increase of land caused by the deposit of earth, sand or sediment thereon by *contiguous* waters.

Accretions or alluvion is the *result* of this process. (Vol. 1, Am. & Eng. Enc. of Law, 2d Ed., 467.)

Whether the waters are *navigable or unnavigable* is ordinarily a matter of indifference. The only instance in which the navigability of the body of water is of importance being when the existence or non-existence of this characteristic determines the ownership of the shores, bed or bottom. (*Id.*, 468.)

Reliction, when applied to the land left dry by gradual recession, is regarded the same in effect as alluvion and the *same principles* are held to regulate both. (*Id.*, 473.)

The right to accretions depends upon *contiguity*. *Id.*, Note 2, page 473 *id.*

As accretions are a growth, it is necessary that where one claims land by reliction or accretion, he should show the *history* of the formation. *Id.*, 474, note.

> "The right to future accretions is inherent in the property itself and forms an essential attribute of it, resulting from NATURAL LAW in consequence of the local *situation of the land*, just as much as the natural fruits of a tree belong to the owner of the land." *Municipality No. 2* v. *The Orleans Cotton Press*, 9 La., 437.

The general rules of apportionment of flats on tidal rivers and the seashore under the old colonial ordinance which are held to apply in cases of accretions in inland rivers and lakes, *Kehr* v. *Snyder*, 114 Ills., 313, are shown on page 521 of 9 Gray (Mass.) Reports. Some of them are as follows:

> 1st. The intention of the ordinance was, "if practicable, to give to every proprietor of the flats in front of his upland, of equal width of his lot at low water mark."
>
> 2d. The nearest channel from which the tide never ebbs, though not adapted to navigation, is the limit.
>
> 3d. The direction of the side lines of the flats is not governed by that of *the side lines of the upland*.
>
> 4th. Where there is no cove or headland, a straight line is to be drawn according to the general course of the shore at high water, and the side lines of the lots extended at right angles with the shore line.
>
> 5th. Around a headland, the lines dividing the flats must diverge towards low water mark.
>
> 6th. In a shallow cove, in which there is no channel a base line may be run across the mouth of the cove, and parallel lines drawn, at right an-

gles with the base line, from the ends of the division lines of the upland to low water mark.

7th. A deep cove, out of which the tide entirely ebbs at low water, is to be divided by drawing a line across its mouth, giving to each proprietor a width upon the base line proportional to the width of his shore line, and then drawing straight converging lines from the divisions at the shore to the corresponding points on the base line.

8th. The direction of the side lines of flats in a cove may be modified by the course of the channel bounding them, or by the position of other channels between part of that channel and the upland.

9th. It seems, that after passing the mouth or narrowest part of a cove, the lines may diverge, if necessary to preserve the proportions of different estates.

From these rules it is apparent that the disposal in the decree of the accretions in the bays or coves upon the east and west sides of the north end of the ridge was accurate. The extension of the east and west center line of section 20 naturally divided the accretions in the bay on the west. The extension of the north and south center line of said section naturally divided those in the bay on the east; or at least was slightly to the prejudice of Mr. Shedd, a south-easterly extension instead of a southerly one being suggested by the contour of the original shore line.

However, with these division lines as well as with the one extended east along the south boundary of section 29, Mrs. Hardin has no concern. Nor is Mr. Shedd affected by the extension of the east and west center line of fractional section 19, which evidently is prejudicial to Mrs. Hardin's neighbor upon the north. The more accurate method obviously was to extend it

southe-asterly at right angles with the original shore line.

Complaint, however, is made (pp. 164 to 169 of Mr. Dent's brief) particularly of the finding that the South tongue of land or fractional Section 29, extended north 160 rods, and of the extension of the dividing line north-west from about the 160 rods point across a part of Section 30, if squared out.

The answer is:

1. The line should have been run in the same direction, but have been placed 40 rods further *south* viz.: at a point where the shore line originally crossed the north and south line dividing fractional Section 29 and the fractional East one-half South East one-quarter of Section 30, as found in Judge TULEY's former opinion (p. 215 Mr. Dent's brief).

Thus Mrs. Hardin was awarded about 40 acres more land than she was entitled to.

Defendant in error did not assign cross-error in the State Supreme Court on this account, but it is thought that he could have done so with good ground.

2. As said South tongue in any event lay some distance east of the said north and south dividing lines and since all accretions around a headland naturally belong to it, possibly the line should have been extended directly *west*.

3. The line of 40 degrees run by Judge TULEY was at a right angle to the direction of the shore line of the tongue of land at the latitude of the starting point of said 40° line, and it was given its direction on this account.

The finding that Hyde Lake had originally been a separate body of water, or had become such land prior to the suit, admits of no contradiction.

1. The average height of the land on the intervening space is about 2.3 feet above datum. (Map C, Record, 91.) Allowing that the process of land making by vegetation (mentioned in *Fuller* v. *Shedd*) has added the .3 foot, and assuming that the water in 1834–5 had been at 2.2 feet above datum, as has been four times found judicially this finding that the 'intervening space" was then but "slightly covered with water" (.2 foot deep) is very exactly accounted for. Had this portion of the ridge arisen .3 foot in 1874, water at 2.2 feet above datum would make it solid land at that time.

2. Assume further that there was more direct communication between the waters of Wolf and Hyde lakes and those of Lake Michigan about 1874 and subsequently, by reason of the frequent disturbance of the sand bar at the mouth of Wolf river and the dredging of the Calumet river. This would cause the waters of said two lakes to seek the level of the waters of Lake Michigan (which for twenty years had averaged 1.8 feet above datum). We have then the intervening space .5 feet out of the water—surely enough to warrant a claim to its being "uncovered or laid bare," and to have become solid land.

3. Or we further allow for the evaporation which in such shallow lakes would make a susceptible difference, say .2 foot more on this account, we have the intervening space .7 foot out of water.

If the state court's ruling is adhered to in this court, it is, of course, immaterial what "breaks", if any, there were, in the continuity of this ridge.

For, undoubtedly all the land along the ridge became dry first, and as each portion of the ridge, if submerged, rose out of the water, it attached itself to the adjoining knolls or ridges.

In other words, if several of these higher places along the line of the ridge originally constituted "islands," which counsel evidently has striven hard to show, each of them upon the recession of the water would have taken the uncovered land immediately around it as accretions and divided with the next island north or south of it, the space intervening between them when it all should have become dry.

The finding that the whole ridge had become dry while there was water to the west, precludes all claim that land *west* of the water could take any of the ridges as an accretion.

As to the law upon this theory of island accretions above stated, see:

Benson v. *Morrow*, 61 Mo., 345.
Cooly v. *Golden*, 117 Mo., 33, and 21 L. R. A., 300.

We do not recall that it is claimed anywhere in our opponent's brief in this court that Hyde Lake had "shallowed into ponds" before this suit was commenced, or *at the same time* that the eighty or ninety rods intervening space became dry.

This was an impossibility as shown by the elevations on map C. (Rec., 91.)

Even so, the said "space" would have belonged to the two tongues.

For, if both the bed of Hyde Lake and said space had appeared like the rising of a plane out of the water, it would have been apportioned in the same manner as if accretions had grown to the whole bank of the lake and around the point of the tongues *equally*.

If this latter process had taken place and continued it will be perceived that when forty or forty-five rods of accretions had attached to the lake's original shore line the intervening space would have been entirely closed up, leaving a large body of water between the then continuous east bank and the west bank.

The law as to these "plane" accretions, so to term them, is found in

Am. & Eng. Ency., 2d Ed., Vol. 1, 474.
Buse v. *Russell*, 86 Mo., 209.
Bigelow v. *Hoover*, 85 Ia., 161.
Naylor v. *Cox*, 114 Mo., 232.

~~Brewer.~~

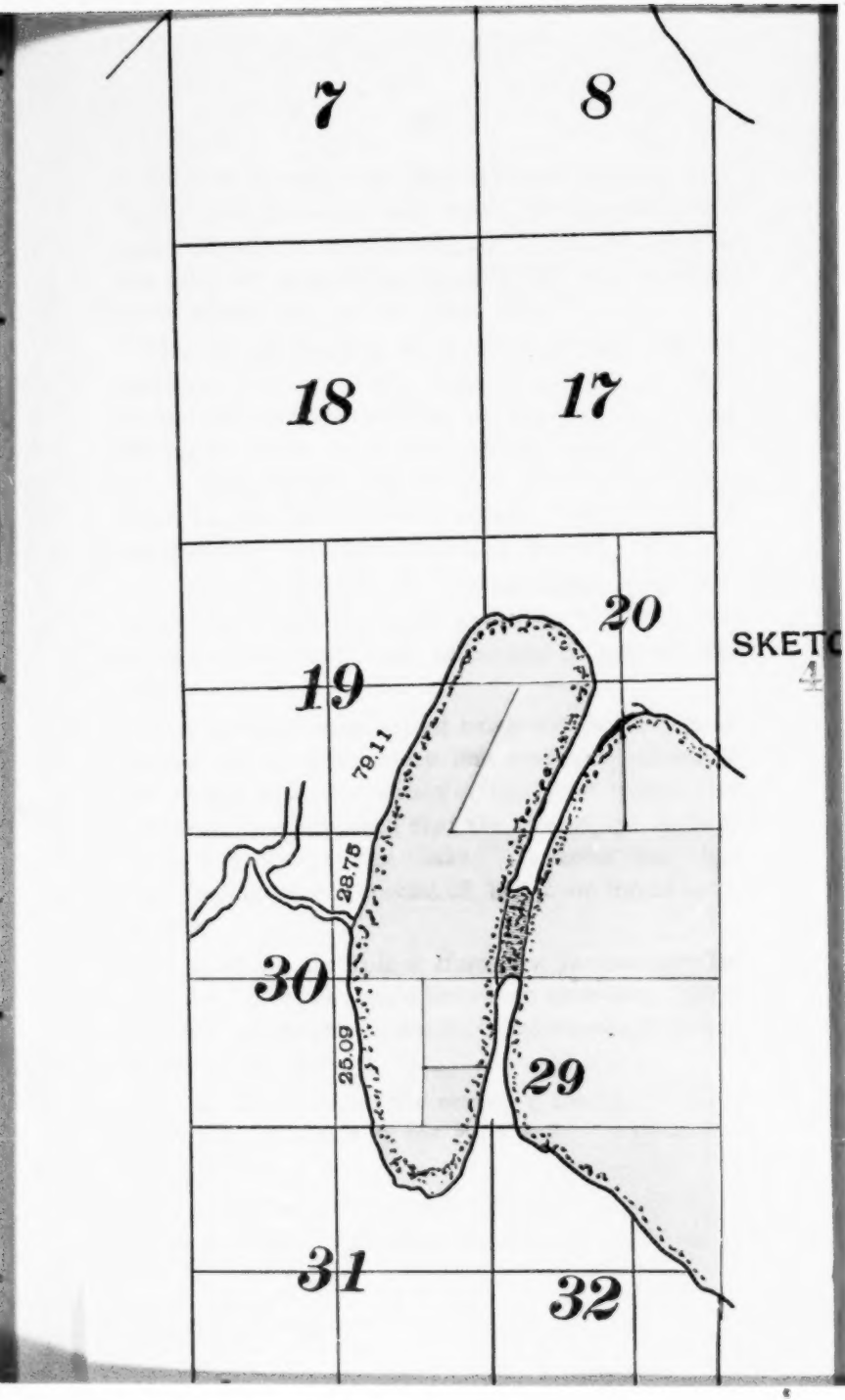
VII.

DEFENDANT IN ERROR IN FACT TAKES NO MORE LAND BY THE DECREE UPON THE ACCRETION BASIS THAN HE WOULD HAVE TAKEN IF THE TITLE TO THE SUBMERGED LANDS HAD BEEN HELD TO HAVE PASSED UNDER THE PATENTS.

As to the first decree of the State Circuit Court of August 10, 1892. (Rec., 416.)

Judge TULEY, assuming that the law of the case was to be derived from *Hardin* v. *Jordan* (140 U. S., 371) and that there was private ownership of the bed of the lake, recited in his original opinion the actual status of the land and water at the time of the orginal survey. He held that the tongue of land on the South extended North to the east and west center line of Section twenty-nine (29), squared out, and that the North tongue extended South to about the South line of Section twenty (20), squared out.

In such case, the decree, on his assumed basis of law, could only have been correctly entered after an actual survey of the whole lake for this special purpose, a finding of its center and an extension of boundary lines converging towards the center. Or if there were two lakes to apply this method to both. He with no such data at hand seized upon the section lines viz.: The South line of Section twenty (20), squared out, and the center line of Section twenty-nine (29), squared out, as the only lines available, and at-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tempted to extend those lines as boundary lines, confessing that probably they would trespass upon the rights of other parties owning tracts not involved in the suit, but attempting to make them binding as between Shedd and Hardin. (See "Sketch 4.")

That he was clearly in error as to the original extent southward of the North ridge is shown by the unbroken line of trees described in the testimony, and especially shown in a plat (which Mrs. Hardin offered), as extending just about sixty rods or more, south of the South line of Section twenty (20), if squared out. (Hardin's Exhibit 1, Record, 173.)

It is also proven by the elaborate map "C," which shows high elevations extending to almost the middle of the North half of Section 29 squared out. (Record, 91.)

The assumed necessity of using the South line of Section 20 for a boundary line evidently influenced his finding as to the extent of the North tongue. He could not have supposed that the site of the McDaid house had always been "lake." It seems clear that this finding was a species of heroic or forced compromise.

In applying the rule of *Hardin* v. *Jordan*, it is not clear how the lines should have been extended, even if the plats and measurements in evidence were sufficiently accurate *data* therefor.

Judge TULEY found the center of the lake to be in Indiana a little east of the state line. (Brief of Mr. Dent, p. 216).

Upon the basis stated, and taking the extent of the ridges as found by the State Supreme Court, his divis-

ion should have been something like that shown in following "Sketch 5."

(In sketches 4 to 7, the green denotes land awarded to Mr. Shedd, the pink shows that awarded to Mrs. Hardin.)

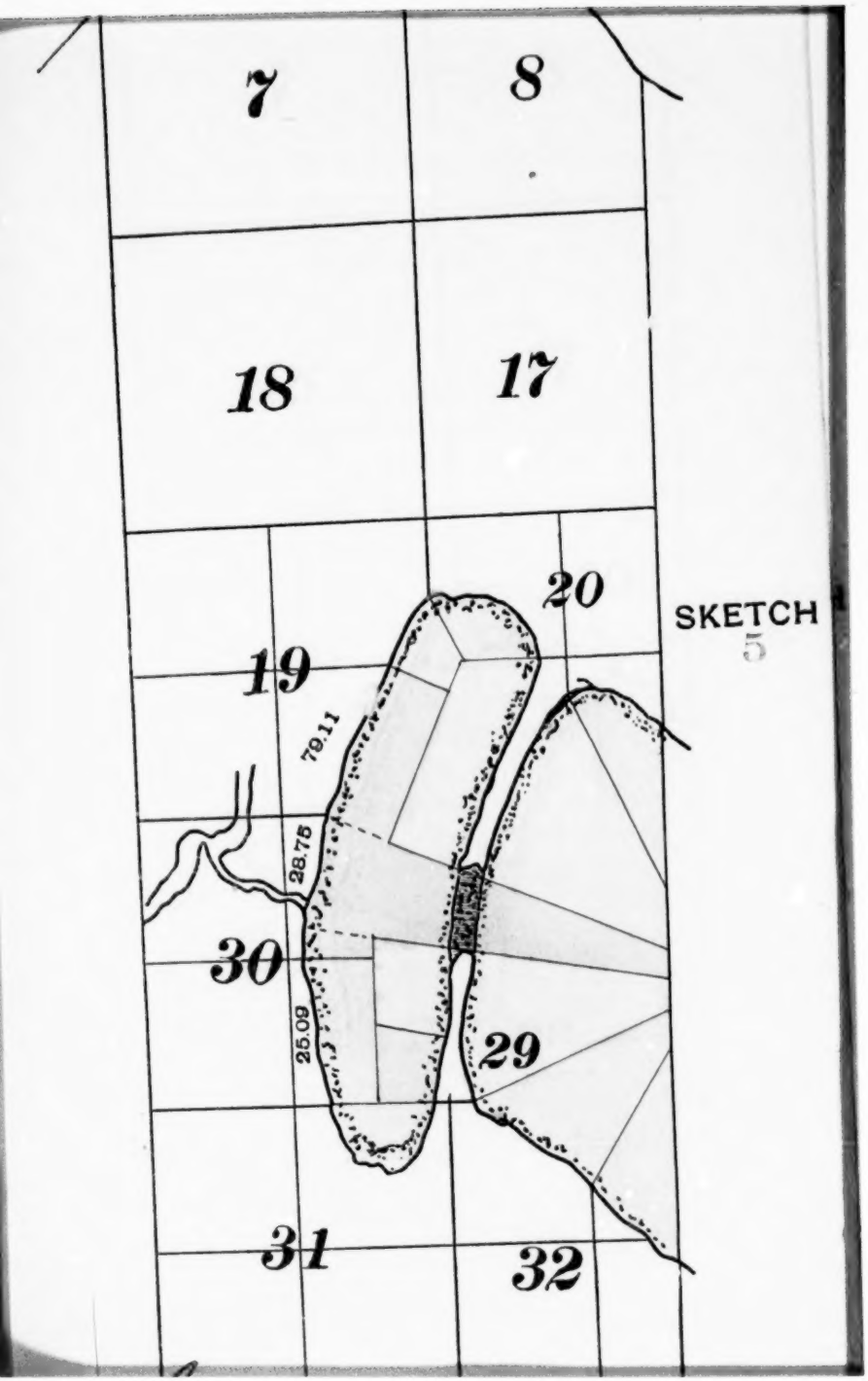
However, the Illinois court had no judicial knowledge of the Indiana side of the lake. Thus the state line could have been taken as the limit and the Illinois portion dealt with as an entire lake with an absolute wall or barrier on the state line. In which case a center would have been found a considerable distance west of the state line and the division could have been made something like that shown in "Sketch 6."

But inasmuch as the two tongues of land approached so near to each other it does not seem that Mrs. Hardin's shore line, lying way to the west, should be the basis of extending her side lines to take in this intervening space between said tongues.

Hyde Lake was, in 1834–5, either a separate lake or a distinct harbor or division or large cove of the one body of water.

The ridge was practically continuous, there being only marsh or grass in the intervening space between the tongues. (Judge GRESHAM therefore constantly speaks in his findings of a "lake or lakes.")

If the rules of the United States survey did not require narrow tongues like these to be meandered (which is now a well-known fact), it would seem to have made no difference in this case whether they approached near to each other or actually joined each other.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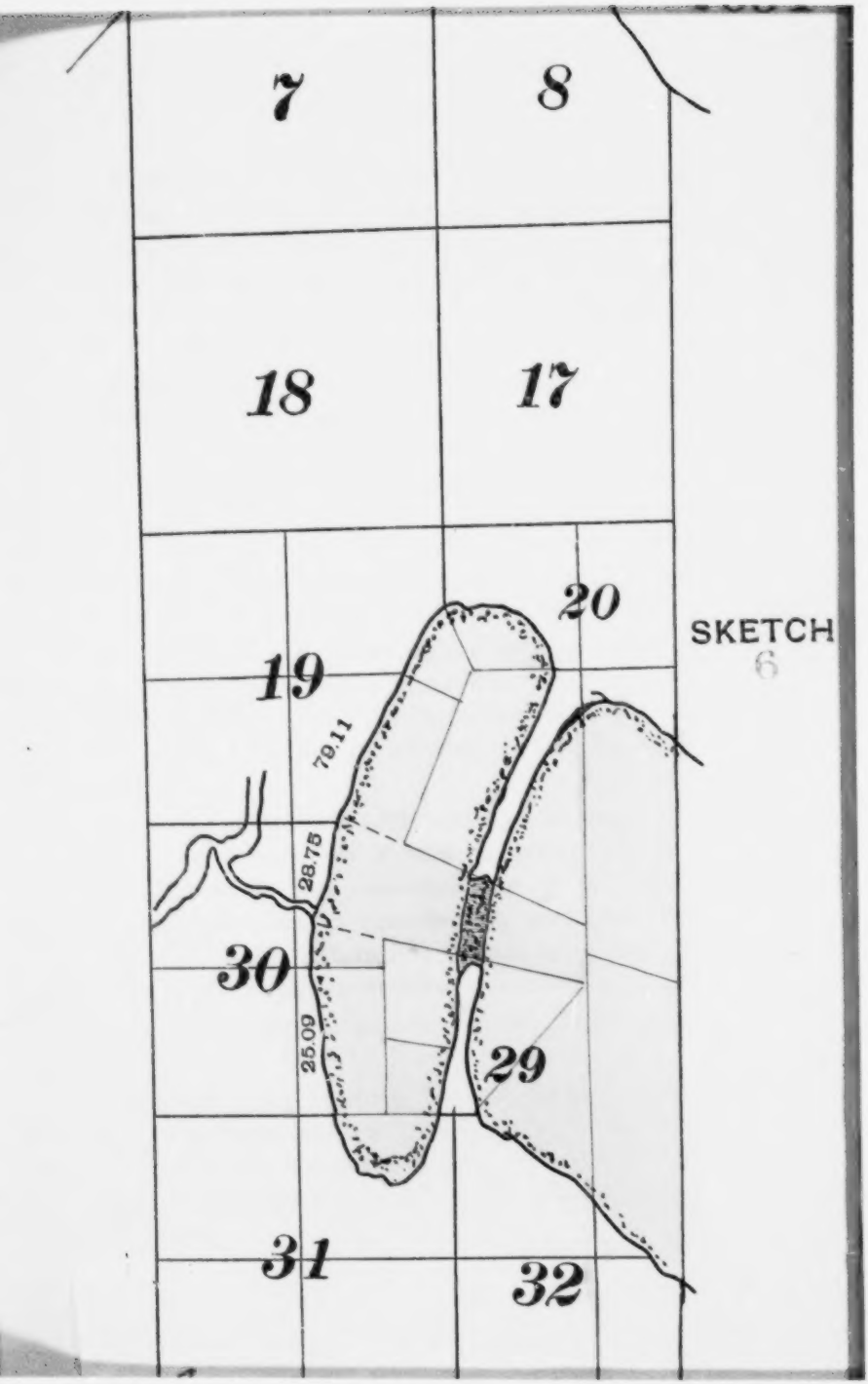
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A lake with a permanent reef or tongue of land extending across it so definite and permanent as to physically and continuously separate the water into two bodies, but so narrow as not to pay for the cost of survey, could, it would seem, be appropriately platted as one lake, as this one was.

In such case the meander cutting no figure, the continuous ridge would belong to the purchasers of fractional Section 29 and the Southwest fractional one-quarter of Section 20, each taking half of the portion between the two meander lines. And thus in case of a "lake bed" division, Hyde Lake would have been divided by a line extending up and down the middle of it, Mrs. Hardin taking only to the middle.

But conceding that the eighty or ninety rods of marsh between the two tongues was "lake" and not "land" how much less of the Hyde Lake bed should the two tongues of land be awarded than in the other instance?

We suggest that possibly the fact of there being eighty or ninety rods of water space would allow Mrs. Hardin to come somewhat east of the middle line of Hyde Lake, in extending the side lines from that portion of her shore line directly opposite to and co-extensive with said intervening space on the ridge.

But should they be extended *as far as* said space? or *across* it?

The said space adjoined the two tongues of land and by giving each of said tongues one-half thereof (or 40 or 45 rods), we would seem to be doing a more natural thing than to give it to a shore 160 rods across the water.

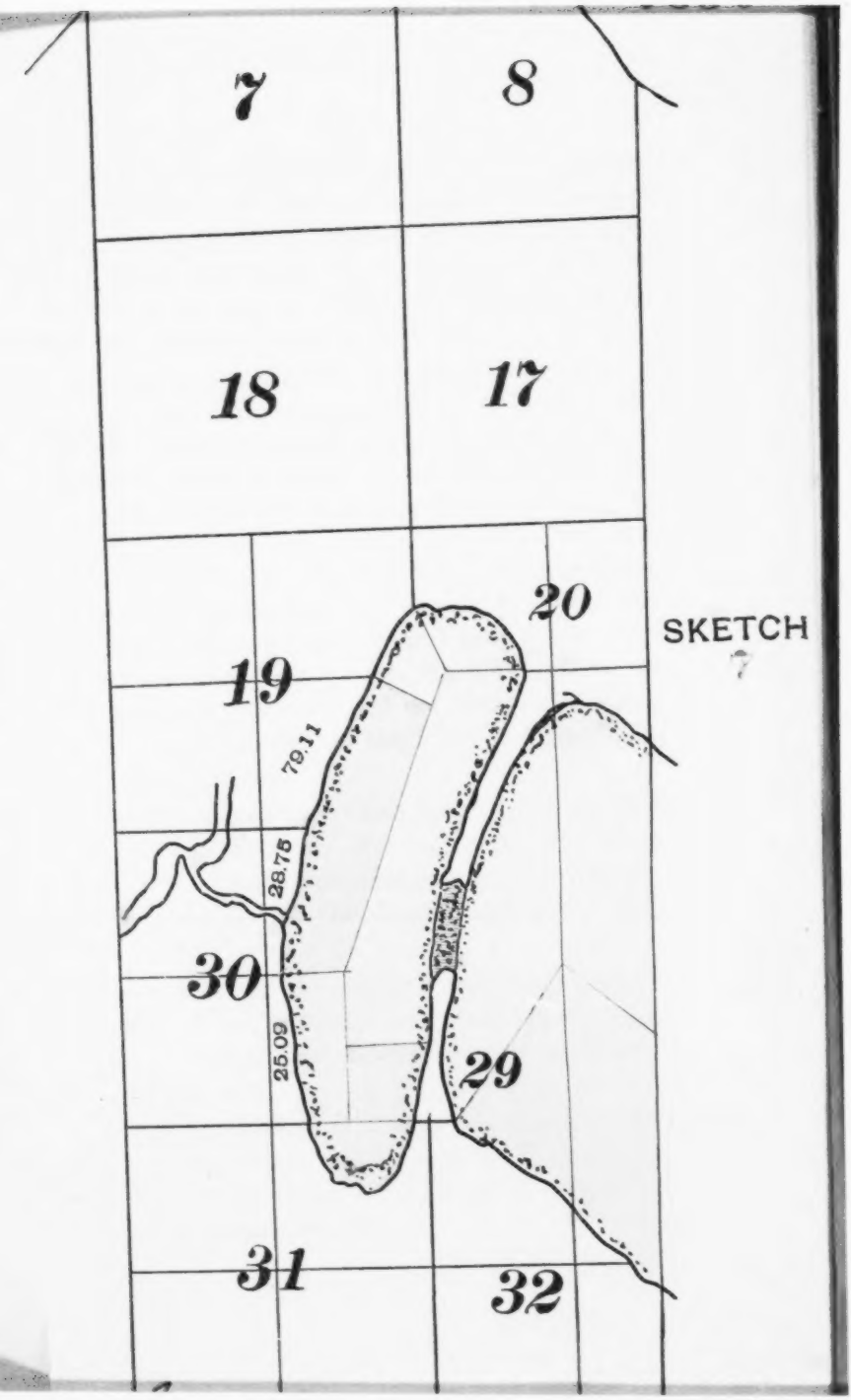
In such case the showing in "sketch 7" is thought to be accurate.

So it would seem that in any event Mrs. Hardin could not get much, if at all, beyond the middle of Hyde Lake.

Counsel have taken great pains to show some depressions in the land south of the Field house, and to argue that the southern ridge was not continuous; and have repeatedly referred to the site of the Field house as "Elm *Island*", a name repeated by very few witnesses or scarcely any outside of Mrs. Hardin's husband. Rec., 390–1, 239.) While there were some occasional depressions in the space in question, yet the elevations shown upon "map C" (Rec., 91) indicate an almost continuous height of at least 2.2 feet above datum, the height of the water which would cause shore lines to be generally identical with those of the 1834–5 survey. It is not thought necessary to refer in detail to the mass of evidence in the record which sustains the finding as to the extent of these tongues of land. The Thomas house was built upon this space ("map 7" p. 44, Mr. Dent's brief.)

As to the railroad map (*id.*, p. 41) it is sufficient to say that the road was not surveyed or built upon the ridge, but upon the western slope of it, and to a great extent in the marsh along its western margin, the road bed being composed of dredgings from a deep and wide ditch on the west thereof. (*id.*, p. 42.)

As to "map 16," (*id.*, p. 147), enough is revealed in the reports of the cases of *Hardin* v. *Jordan* and *Fuller* v. *Shedd* to show that counsel for Mrs. Hardin did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not question but affirmed the doctrine that a meander line is not a line of boundary, and that in the absence of fraud or mistake the purchaser of a meandered fractional quarter, took title to *all* the existing land and the grant to him was co-extensive therewith. This rule has been consistently held to be correct.

Now, when the Southwest fractional one-quarter of Section 20 was meandered and sold out to De Witt (Mr. Shedd's remote grantor-in-title), the latter took all the land in sight, extending to the 220 rods point, or extending 40 or 45 rods further south if the ridge be treated as continuous. Hence, De Witt got title to 25 or 30 acres of solid land instead of only to the 4.53 acres inside the meander. In this he might have been lucky. But by a rule of the United States land department such long narrow spurs or tongues or ridges were not surveyed, and not reckoned in fixing the purchase price; and so the fruits of his purchase were legitimately his.

While others might envy him his good fortune, they were not injured by it. For all parties purchasing upon bodies of water were presumed to have regard to and to take notice of the actual shore lines and all other physical facts.

If, therefore, this 25 or 30 acre tract, with its peculiar formation and elongated shore line had as appurtenant to it a great deal of lake bed, it constituted no wrong to any one.

Or, if through a series of natural processes by accretions thisoriginal tract had become a much larger tract several times as large as its original size, still it constituted no such wrong.

The responsibility for the liberality to De Witt in the former instance lay with the government; for that to his grantees in the latter instance, it lay with the government and nature combined.

The government is not complaining or seeking to recall its deed.

And in accretions we follow nature, and to her we cannot dictate.

If De Witt or his grantees have through the action of the government and nature combined come out better than they have deserved, the plaintiffs in error are guiltless at all events and should be free from any feelings of self-reproach therefor.

But speaking of luck, it may be remarked that the 2.04 acres in the fractional East one-half of South East one-quarter of Section 30, which evidently was all the land covered by such description has been well treated in the growth of accretions, having taken about ninety acres by the decree in question. (See "map No. 8", Mr. Dent's brief, p. 176.)

If Mr. De Witt acquired by his patent the whole of the North tongue extending south to the McDaid house at the 220 rod-point, it is hard to understand why Mrs. Hardin should be awarded approximately the south two-thirds of this tongue of land, with all submerged land on both sides of it as per " map 16;" or why she should be given the north two-thirds of the South tongue in fractional Section 29 with adjoining submerged land on either side of it.

Evidently the maker of this map (for use as a suggested division between the parties) has been guilty of no undue liberality to Mr. Shedd.

The counsel refer (p. 161 of brief) to some expression of this court in *Hardin* v. *Jordan* in reference to the extent of the projection of land from the north, viz.:

> "It does not appear to have extended far enough southerly, *at least during high water*, to be opposed to the property of the plaintiff."

Mr. Justice BRADLEY was here evidently thinking of the rule applicable to lands bordering on tidal waters in which high water mark is adopted.

Whereas the rule now settled in most inland water cases is that the shore line is to be taken as of a time when the waters are "free from disturbing causes," or when they are at "ordinary stages." *Fuller* v., *Shedd, supra.*

This as repeatedly stated, was 2.2 feet above datum. Had this court had in evidence "Jordan's map C" (Rec., 91), showing elevations during the whole length of this projection of from 3 to 5 feet, or Hardin's Exhibit (Rec., 173), showing the unbroken line of trees, it would certainly not have made this remark.

As to some suggestions in the brief of plaintiffs in error:

1. At page 155–7 and in several other places, counsel, in the effort to minimize the extent of the tongues of land quote from Mrs. Hardin's pleadings in respect to it.

The relevancy of this is not perceived.

As said elsewhere, the claim of Mr. Shedd was for all of fractional Section 29 and fractional South West one-quarter Section 20, and for adjustment of riparian rights.

In the petitions or answers in the case the statements of physical facts were mere surplusage and cut no figure.

2. Asking this court to accept the rule of *Hardin* v. *Jordan*, the "lake bed" theory of division, it is in the interest of Mrs. Hardin to minimize the extent of the ridge or tongues as they existed in 1834–5.

To this end her counsel have made a volume of suggestions towards showing that the water at the time of the original survey was quite high. It was estimated by the witness Rossiter upon his second examination to have been about four or five feet above datum (Record, 367), or from 3 to 5 feet (Rec., 318). The references to sustain this claim are chiefly to the opinion of this witness. A number of references are made to the testimony of various other witnesses (Brief, pp. 44 to 47), and elsewhere generally to the effect that they "had seen" the water come up to such and such a height, etc., evidently referring to flood times, the height of the water varying greatly on account of local conditions.

As to the witness Rossiter, the record shows a rather spicy cross-examination (Rec., 325-332, 341, 371); and his statements could hardly be singled out with much confidence from the mass of evidence given by many witnesses to support an estimate peculiar to him alone. His statement should hardly be taken against the judicial finding of four different cour s.

It is apparent from "map 1" (Rec., 61) and "map C" (Rec., 91) that water at the height of five feet above datum would have submerged half the township.

As to this court's appropriate order in the case.

It is thought this court is apt to hold the whole question involved herein as one of local law.

But in any event it seems to us, it should not reject findings of the State Supreme Court in *Fuller* v. *Shedd*, that court being the ultimate judge of the facts so far as state forums are concerned.

It is hardly to be conceived that this court would be disposed to enter a final order here running boundary lines based upon the recent claim of plaintiffs in error that there *was no ridge whatever* in 1834–5, and that the meander ought to be taken as *correct* as to the actual amount of dry land.

A great mass of the evidence was given upon the part of the second patentees, who dropped out of the case after the *Fuller* v. *Shedd* decision, which is omitted from this record.

This, however, all parties to the case, Mr. Shedd included, had the benefit of.

In the stipulation (Record, 457) it is agreed that certain pleadings and certain evidence should be included in the record, and in paragraph 8, that the pleadings of Jordan and other second patentees "and all documentary and other evidence relating thereto, except as herein provided, may be excluded, and only such parts of the testimony given on the hearing as may be necessary to show tne physical condition of the lake and lake bed may be included."

This was evidently made for the purpose of enabling the court to pass upon the main question of whether the rule of "accretions" or the rule of private ownership of the bed was to control. It evidently would

have been burdensome to the court to load the record down with all the evidence as to physical facts.

It is not thought that even if this court should hold to the *Hadinrv. Jordan* rule, it would overturn a finding of facts delivered judicially upon the same issue four times, and base such action upon the "estimate" of *one* witness, whom it had no chance to see upon the stand!

If "sketch 7" be substantially correct (as we contend it is), as showing a proper apportionment in a lake or lakes of a shape similar to Wolf and Hyde upon the basis of private ownership of the bed, Mrs. Hardin has taken by this decree about forty- or forty-five acres of land belonging to Shedd; Shedd has taken no land belonging to her; and her only cause of complaint is that the court did not allow her the west half of the land yet remaining submerged by Hyde lake.

Even if this complaint were heeded a restoration of said portion to her would only be done upon restoration by her of the forty-five or fifty acres belonging on either theory to Mr. Shedd.

And if her statement and her counsel's claim is true that by 1891, Hyde lake had "shallowed into ponds," or become substantially dry, she has scarcely a complaint at all. For, by the very definition of her rights in and by the terms of the decree, her boundary line shifts with the water. And in such case it actually has shifted to the middle line of what was formerly Hyde lake, the bed thereof being shown to be practically level.

It is not believed that the court will reach a serious consideration of the suggestions under this last heading. But it was thought not inappropriate to run out the theory of the opposition to its ultimate consequences.

The actual complaint thus seemingly becomes trivial, and is thrice barred from this court's notice.

It is respectfully submitted that the writ of error should be dismissed; that in the alternative the judgment should be affirmed.

HARRY S. MECARTNEY,
For Defendant in Error.

FILE COPY.

FILED
JAN 6 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 56.

GERTRUDE H. HARDIN ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD.

MOTION TO DISMISS THE WRIT OF ERROR.

HARRY S. MECARTNEY,
Counsel for Defendant in Error.

(18,075.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 5436

Supreme Court of the United States

OCTOBER TERM, A. D. 1902.

No. 56.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY, PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION TO DISMISS THE WRIT OF ERROR.

And now comes the defendant in error, Charles B. Shedd, by Harry S. Mecartney, counsel, and moves this honorable court to dismiss the writ of error aforesaid, and in support of said motion assigns the following grounds:

1. No Federal question is displayed in the transcript of record herein or involved in the issues shown therein.

2. The right, title, privilege, or immunity now claimed by the plaintiff in error was not specially set up or claimed in the pleadings in the case or in the trial court, or preserved by assignments of error made herein in the supreme court of Illinois.

3. The issues involved herein are all matters of the local law of Illinois, in which the decision of the said supreme court of Illinois is final.

In support of the said grounds of this motion, the defendant in error refers to points numbered I, II, and V of the brief of defendant in error filed herein.

CHARLES B. SHEDD,
Defendant in Error,
By HARRY S. MECARTNEY,
Counsel.

Supreme Court of the United States.

No. 56.—October Term, 1902.

Gertrude H. Hardin and The Cook County Canal and Dock Company, Plaintiffs in Error,
vs.
Charles B. Shedd.

In error to the Supreme Court of the State of Illinois.

[May 18, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding under the Burnt Records Act of the State of Illinois, by which the defendant in error, Shedd, seeks to establish his record title to certain land adjoining and under a non-navigable lake called Wolf Lake, lying partly in Illinois and partly in Indiana. The plaintiff in error, Hardin, also owns land adjoining the same lake, by succession to a title under patents from the United States, and under these patents makes claims to land now or originally under the lake, which conflict with the claim of Shedd and with the decree of the court. The other plaintiff in error is a grantee of Hardin. The decree having been affirmed by the Supreme Court of the State, 177 Ill. 123; *S. C.*, 161 Ill. 462, the case is brought here by writ of error. *Mitchell* v. *Smale*, 140 U. S. 406, 410. *Shively* v. *Bowlby*, 152 U. S. 1, 9, 10. It seems unnecessary to go into details of the difference, as the main question here goes to the foundation of Hardin's case, and we are against her on that. Her title and a plan of the territory in which lies the disputed land will be found set out in *Hardin* v. *Jordan*, 140 U. S. 371.

The claim of the plaintiffs in error to the land below the original water line depends on its having passed by the patent of the United States. The patent to Holbrook, from which they derive an important part of their title, was dated May 20, 1841, long before the Swamp-Land Act. At that time the land under the lake, as well as that surrounding it, belonged to the United States, and if grants of the United States should be construed without regard to State laws, it may be assumed that, subject to all questions of the proper adjustment of lines, Hardin would have prevailed. When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the

State by its admission to the Union. Nevertheless it has become established almost without argument that in the former case as in the latter the effect of the grant on the title to adjoining submerged land will be determined by the law of the State where the land lies. In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the State, so far as its conveyances are concerned. *Hardin* v. *Jordan*, 140 U. S. 371; *Shively* v. *Bowlby*, 152 U. S. 1, 45; *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S. 87, 90, 93; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 363. (Such cases are not affected by Rev. Stat., §§ 2476, 5251.) When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the State which does own it that it is attached to the shore. The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passed to the State on its admission or otherwise, apart from the Swamp-Land Act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point.

The law of Illinois has been settled since *Hardin* v. *Jordan*, 140 U. S. 371, and it now is clear, by the decision in this case and later, that conveyances of the upland do not carry adjoining land below the water line. *Fuller* v. *Shedd*, 161 Ill. 462; *Hardin* v. *Shedd*, 177 Ill. 123; *Hammond* v. *Shepard*, 186 Ill. 235. Following these decisions, we must hold that the title set up by the plaintiffs in error fails. Even accepting the principles of the common law, it may be a question whether one consideration in this case was not overlooked in *Hardin* v. *Jordan*. It was noted that the conveyance was by reference to the official plat. The plat of the Illinois portion, unlike that of the part in Indiana, described the lake as a "navigable lake." It is true that this was a mistake, but it might be urged that the description must be taken to have the same effect as if it were true when we are determining the effect of a conveyance adopting it. It would seem that if a conveyance of land bounded by navigable water would not pass land below the water line, a conveyance purporting to bound the land by navigable water does not purport to pass land below the water line. The common law as understood by this court and the local law of Illinois with regard to grants bounded by navigable water are the same. *Shiveley* v. *Bowlby*, 152 U. S. 1, 43, 47, 51; *Seaman* v. *Smith*, 24 Ill. 521.

Of course, it would result from the Illinois ruling that the survey of the submerged land in 1874, referred to in *Hardin* v. *Jordan*, and the con-

veyances in pursuance of it, may have been good on the Illinois side of the State line, unless the State had got a title before that date under the Swamp-Land Act. Whether it did so or not, it is unnecessary to consider in this case.

The land which Shedd gets under the decree of the State court he gets, not in derogation of the foregoing principles, but on findings of fact as to what land was above water at the date of the patents from the United States, 161 Ill. 469, 470, and as to accretions to that land by the gradual drying up of the water at a later date. 161 Ill. 473, 494. We perceive no need for considering the decree in detail.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 56.—October Term, 1902.

Gertrude H. Hardin and The Cook County Canal and Dock Company, Plaintiffs in Error, *vs.* Charles B. Shedd. } In error to the Supreme Court of the State of Illinois.

[May 18, 1903.]

Mr. Justice White, with whom concurs Mr. Justice McKenna, dissenting.

This case, in some aspects, involves contentions supposed to have been finally decided by this court in *Hardin* v. *Jordan*, (140 U. S. 371,) and *Mitchell* v. *Smale*, (140 U. S. 406.) In those cases there was a controversy between persons holding the patents of the United States to fractional lots abutting on the meander line of Wolf Lake in Illinois and those holding the patents of the United States subsequently issued to the bed of the lake. The latter patents were based upon a survey made of the bed, approved after contest in the Land Department. It was held in the cases referred to that the rights of the claimants to the bed of the lake were to be determined by the local law of Illinois. Ascertaining what the local law was, it was decided that the abutting lot owners took to the center of the lake, and hence the subsequent patents to the bed were void.

The controversy presented by this record originated from comflicting claims made in two suits, (subsequently consolidated) to the bed of Wolf Lake, between Mrs. Hardin (who was the plaintiff in *Hardin* v. *Jordan*) and one of her grantees, as owners of the border lots, Shedd, (grantee of Mitchell, the plaintiff in *Mitchell* v. *Smale*,) also as an owner of border lots, and various claimants under patents of the United States based upon the survey of the bed of the lake. Although the judgment below was against the second patentees, they have not prosecuted error. The Supreme Court of Illinois declined to apply the rule laid down by this court because it held that this conrt had in *Hardin* v. *Jordan* and *Mitchell* v. *Smale* misconceived the State law. By the local law it was held that the lot owners by the conveyance to them of lots abutting on the meander line took no title whatever to the bed of the lake. It was, however, decided that the effect of the conveyance by the United States to private persons of the border lots was to transfer the title of the bed of tho lake to the State of Illinois. The doctrine of the Supreme Court of Illinois on the subject is

not only shown in the opinion of that court in this case (*Fuller* v. *Shedd*, 161 Ill. 462,) but also in the subsequent case of *Hammond* v. *Shepard*, (186 Ill. 235.) In the first case (*Fuller* v. *Shedd*,) after expressly deciding that the State of Illinois did not acquire title to the bed of the lake under the swamp land act, the court declined to hold "that the grant to the riparian owner conveys the bed of a non-navigable (meander) lake, and makes its waters mere private waters;" and, further, said that, "so long as such meander lakes exist, over their waters and bed, when covered with water, the State exercised control, and holds the same in trust for all the people who alike have benefit thereof, in fishing, boating and the like." In the second case (*Hammond* v. *Shepard*) the Supreme Court of Illinois said (p. 241):

"The law of this State, as repeatedly announced, is that shore owners on meandered lakes, whether navigable or non-navigable, take title only to the water's edge, the bed of the lake being in the State.

* * * * * *

"No shore owner can take away from the State its title to the former bed of the lake unless he can establish by proof that the dry land was formed by the water receding from his shore line."

Under the doctrine thus stated, having treated the bed of the lake as the property of the State, the court determined the rights of the parties by reference to principles of accretion which it deemed applicable to the property in the bed of the lake owned by the State. Now, in *Kean* v. *Calumet Canal & Improvement Company*, quite recently decided by this court, the doctrine announced in *Hardin* v. *Jordan* was re-examined, and it was in effect held that that case, whilst recognizing that the ownership of the beds of non-navigable lakes on the public domain was in the United States, simply decided that when the United States sold lots bordering on such a lake the question whether or not the bed of the lake passed by the grant of the border lots was to be determined by the principles of conveyancing in force under the local law of the State where the lake was situated. Now, as the settled rule in Illinois is that under the principles of conveyancing prevailing in that State no title to the bed of a lake passes to the patentees of the United States by the sale of border lots, I do not perceive how the United States has been divested of its title to the bed of Wolf Lake. To say that, although on the principles of conveyancing under the local law, the bed did not pass, nevertheless, because the United States sold the border lots, the State of Illinois thereby became the owner of the bed of the lake, is, as I understand it, to declare that it is in the power of the State of Illinois to appropriate the property of the United States.

The suggestion that the considerations just stated are immaterial, because, even although by the local law, the United States did not convey to

the patentees of the border lots title to the bed of the lake, it may have parted with its title to the bed by the swamp lands act, involves a departure from the settled construction of the swamp lands act to which attention was called in the dissent in *Kean* v. *Calumet Canal & Improvement Company.* Besides the disturbance of vested rights to which it seems to me such a suggestion must give rise, it must be remembered that it is directly in conflict with the opinion of the Supreme Court of Illinois in this very case, where it was expressly declared that the State did not take title to the bed of Wolf Lake under the swamp lands act, because as a matter of fact the converse had been explicitly decided by the Secretary of the Interior in a contest before the Land Department to which the State of Illinois was a party. The result of the suggestion as to the swamp lands act then, as I see it, is to cause the State of Illinois to become the owner of the bed of the lake under the swamp lands act, in derogation of the act of Congress, contrary to the rulings of this court and of the Supreme Court of the State, and in disregard of the express findings of fact made by the Secretary of the Interior when he approved the second survey, and also when he rendered the decision on the contest to which the State of Illinois was a party.

I fail to perceive if, as a matter of conveyancing under the local law, the title to the bed of the lake did not pass with the sale of the border lots, how the United States has lost its title. If it be conceded that the view of the local law, announced by this court in *Hardin* v. *Jordan,* was a mistaken one, and that the local law must be taken to be what the lower court held it to be in this case, then it seems to me the only foundation upon which the title of the United States to the bed of the lake can be disputed has disappeared, since in my opinion the theory of accretion which the court below applied cannot be sustained either by reason or authority. I content myself with merely stating this view, which involves the merits, and do not elaborate, because, in my opinion, if it be—as the court now decides—that the question whether the title of the United States to the bed of Wolf Lake passed to the State of Illinois is to be determined solely by the local law of Illinois, as construed by the courts of that State, I do not perceive how a Federal question arises on this record, since I find it impossible to think that there can be a Federal question depending exclusively for its solution upon non-Federal or State law.

I am authorized to say that Mr. Justice McKenna concurs in this dissent.